Datuk Seri Anwar bin Ibrahim v Utusan Melayu (M) Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 23NCVC-10–01 OF 2012
VT SINGHAM J
21 JANUARY 2013

Tort — Defamation — Libel in newspaper — Articles published or caused to be published by local newspaper — Article based on statement given by plaintiff during interview conducted by the British Broadcasting Corporation ('BBC') — Plaintiff a political and opposition leader — Whether articles and words published damaged plaintiff's reputation — Damages — Statutory defences by defendant — Defences of fair comment, justification and qualified privilege and reportage

The plaintiff claimed for damages against the defendants for allegations of two libelous articles published or caused to be published by the defendants, a local newspaper. The two alleged defamatory articles published by the defendants were supposedly based on the statement given by the plaintiff during an interview conducted by the British Broadcasting Corporation ('BBC') where it was stated that the Malaysian legislation on homosexuality should be reviewed. The plaintiff averred that the defamatory articles and words published in the defendant's newspaper had damaged his reputation as the opposition and political leader. Accordingly, the plaintiff filed this suit against the defendants for damages and injunction. It was the defendants' contention that the articles published were not defamatory. The defendants also pleaded that the statutory defences, namely, the defences of fair comment, justification and qualified privilege, and reportage. The issues to be determined before the court, as set out by the parties were: (i) whether the defendants defamed the plaintiff; (ii) whether the words meant or were understood as pleaded; (iii) whether the defences of justification, conditional protection and/or reportage and fair comment applicable to the defendants; (iv) in the event that qualified privilege and/or fair comment applies, whether the defence could still be used if there was 'malice'; and (v) forms of compensation that could be claimed by the plaintiff.

Held, allowing the plaintiff's claim with costs:

(1) The plaintiff's reputation as the Federal Opposition Leader of Malaysia would be gravely affected and had the effect of lowering him in the estimation of right-thinking members of the public or society, generally. The articles and the words published were capable of bearing a defamatory meaning and based upon the articles published, it was

defamatory of the plaintiff. It was important to consider that the plaintiff had denied that he had ever said or had expressed his views that homosexual activities should be legalised in Malaysia and the plaintiff's version was supported by the plaintiff's statement to the BBC to the question posed which was reproduced and was not disputed by the defendants (see para 26).

(2) The plaintiff had only said that the laws on homosexuality have to be reviewed and had no time said or raised the issue that homosexual activities in Malaysia has to be legalised. In any event and even taking the plaintiff's statement further, it did not mean that the law on homosexuality would necessarily be reviewed as a matter of right. It was only the views of the plaintiff that the laws on homosexuality be reviewed for which he had given reasons as to why there was a need to review them and he had also qualified his views for the review (see para 28).

(3) The articles published could not be reconciled nor did it commensurate or was it proportionate with the plaintiff's statement to BBC but it was rather a distorted and incorrect version and obviously taken out of context thereby giving the readers or the public generally that the plaintiff by implication wished to legalise homosexual activities which was not true (see para 30).

(4) For the defence of justification, the defendants failed to provide that the articles published were true in substance and effect. In other words, the defence of justification requires the defendants to prove the same to be true in substance or not materially different from the truth. However, in the present case, the defendants during the course of his oral submissions had conceded and as pleaded in the statement of defence that the plaintiff did not in his statement to the BBC had ever said that he wished or had promoted homosexual activities to be legalised but however, the defendants have attempted to take shield by submitting that the articles published was the views of DW1. The defendants as the publisher and editor respectively owe a duty to the public at large and to the plaintiff to have verified the truth of what was said by DW1 in reference to the plaintiff's statement to BBC before the articles were published and not be influenced merely publishing the articles under the guise of public interest where the articles may eventually turn out to be untrue or was untrue at the time of the publication (see para 46).

(5) For the defence of fair comment, the court found that the defendants failed to establish that the articles published were fair comment. While the publication may have been on a matter of public interest, the defendants did not state or publish or reproduce the entire statement made by the plaintiff during the BBC interview together with the articles published by the defendants (see para 48).

(6) The defendants should not have published the two articles without a proper sense of responsible journalism having been carried out regularly instead of trying desperately to justify the publication that it had merely published what was said by DW1, without even examining the plaintiff's statement to BBC with the articles before it was approved for publication (see para 63).

(7) As for the defence of reportage, which had been pleaded; there ought to be a balancing exercise by the defendants to provide information to the public on matters of public interest which must be the truth as against the need to avoid damaging the reputation of an individual which cannot be compromised. The fact that the articles reported was commented by a supposedly reputable politician should make no difference and was an irrelevant consideration in construing the articles in the context of a defamation suit and based on settled judicial principles and this line of arguments appeared to be another desperate defence under the circumstances (see para 65).

[Bahasa Malaysia summary

Plaintif telah menuntut ganti rugi terhadap defendan-defendan untuk tohmahan dua artikel berbentuk libel yang telah diterbitkan atau disebabkan untuk diterbitkan oleh defendan-defendan, sebuah akhbar tempatan. Dua pengataan artikel berunsur fitnah yang diterbitkan oleh defendan-defendan dikatakan berdasarkan kenyataan yang diberikan oleh plaintif semasa temu ramah yang dilakukan oleh *British Broadcasting Corporation* ('BBC') yang mana ia menyatakan bahawa perundangan Malaysia berhubung homoseksual patut dikaji semula. Plaintif menegaskan bahawa artikel-artikel dan perkataan-perkataan berunsur fitnah yang diterbitkan dalam akhbar defendan telah menjejaskan reputasinya sebagai pemimpin pembangkang dan politik. Sewajarnya, plaintif telah memfailkan guaman ini terhadap defendan-defendan untuk ganti rugi dan injunksi. Adalah hujah defendan-defendan bahawa artikel-artikel yang diterbitkan tidak berunsur fitnah. Defendan-defendan juga mempli bahawa pembelaan-pembelaan statutori, iaitu, pembelaan-pembelaan komen adil, justifikasi dan perlindungan bersyarat, dan pelaporan. Isu-isu yang perlu ditentukan di hadapan mahkamah, sebagaimana ditetapkan oleh pihak-pihak adalah: (i) sama ada defendan-defendan telah memfitnah plaintif; (ii) sama ada perkataan-perkataan itu bermaksud atau difahami sebagai diplikan; (iii) sama ada pembelaan-pembelaan justifikasi, perlindungan bersyarat dan/atau pelaporan dan komen adil terpakai ke atas defendan-defendan; (iv) sekiranya perlindungan bersyarat dan/atau komen adil terpakai, sama ada pembelaan itu masih boleh digunakan jika terdapat 'malice'; dan (v) bentuk-bentuk pampasan yang boleh dituntut oleh plaintif.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Reputasi plaintif sebagai Pemimpin Pembangkang Persekutuan Malaysia

akan terjejas teruk dan mempunyai kesan merendahkannya dalam penilaian pemikiran wajar daripada orang ramai atau masyarakat, secara amnya. Artikel-artikel dan perkataan-perkataan yang diterbitkan mampu membawa maksud berunsur fitnah dan berdasarkan artikel-artikel yang diterbitkan, ia berunsur fitnah terhadap plaintif. Adalah penting untuk mengambil kira bahawa plaintif menafikan yang dia pernah mengatakan atau menyatakan pendapatnya bahawa aktiviti homoseksual patut disahkan di Malaysia dan versi plaintif disokong oleh kenyataan plaintif kepada BBC berhubung persoalan yang diajukan yang telah diterbitkan semula dan tidak dipertikaikan oleh defendan-defendan (lihat perenggan 26).

(2) Plaintif hanya menyatakan bahawa undang-undang berhubung homoseksual perlu dikaji semula dan tidak pada bila-bila masa menyatakan atau menimbulkan isu bahawa aktiviti-aktiviti homoseksual di Malaysia perlu disahkan. Dalam apa keadaan dan walaupun mengemukakan kenyataan plaintif selanjutnya, ia tidak bermakna bahawa undang-undang berhubung homoseksual dikaji semula yang mana dia telah memberikan sebab-sebab kenapa ia perlu dikaji semula dan dia juga telah menjelaskan pendapatnya untuk kajian semula itu (lihat perenggan 28).

(3) Artikel-artikel yang diterbitkan tidak boleh diselaraskan ataupun ia tidak setara ataupun ia bersekadar dengan kenyataan plaintif kepada BBC tetapi ia lebih kepada versi yang telah diputarbelitkan dan tidak betul dan jelas diambil daripada konteks yang memberikan para pembaca atau orang awam secara amnya bahawa plaintif melalui implikasi menginginkan aktiviti-aktiviti homoseksual dibenarkan yang mana adalah tidak benar (lihat perenggan 30).

(4) Untuk pembelaan justifikasi, defendan-defendan telah gagal untuk mengemukakan bahawa artikel-artikel yang diterbitkan itu adalah benar pada amnya dan sebenarnya. Dalam perkataan lain, pembelaan justifikasi memerlukan defendan-defendan membuktikan kandungan artikel-artikel adalah behar pada amnya atau tidak terlalu berbeza daripada fakta sebenar. Walau bagaimanapun, dalam kes ini, defendan-defendan telah mengaku dan sebagaimana diplikan dalam penyataan pembelaan bahawa plaintif dalam penyataannya itu kepada BBC tidak pernah menyatakan bahawa dia menginginkan atau telah menggalakkan aktiviti-aktiviti homoseksual agar disahkan tetapi bagaimanapun, defendan-defendan telah cuba berlindung dengan berhujah bahawa artikel-artikel yang diterbitkan itu adalah pendapat DW1. Defendan-defendan sebagai penerbit dan editor mempunyai kewajipan kepada orang awam secara menyeluruh dan kepada plaintif untuk mengesahkan kebenaran berhubung apa yang dikatakan oleh DW1 merujuk kepada kenyataan plaintif kepada BBC sebelum

artikel-artikel diterbitkan dan tidak dipengaruhi hanya dengan menerbitkan artikel-artikel di bawah samaran kepentingan awam di mana artikel-artikel itu boleh akhirnya menjadi tidak benar atau adalah benar pada masa penerbitan (lihat perenggan 46).

(5) Untuk pembelaan komen adil, mahkamah mendapati bahawa defendan-defendan telah gagal untuk membuktikan bahawa artikel-artikel yang diterbitkan itu adalah komen adil. Tatkala penerbitan mungkin menjadi perkara berhubung kepentingan awam, defendan-defendan tidak menyatakan atau menerbitkan atau mengemukakan semula keseluruhan kenyataan yang dibuat oleh plaintif semasa temu ramah BBC bersama dengan artikel-artikel yang diterbitkan oleh defendan-defendan (lihat perenggan 48).

(6) Defendan-defendan tidak patut menerbitkan kedua-dua artikel tersebut tanpa melaksanakan tanggungjawab sebenar kewartawanan dengan tetap dan bukan cuba sedaya upaya menjustifikasikan penerbitan itu bahawa hanya telah menerbitkan apa yang telah dikatakan oleh DW1, tanpa menyemak langsung kenyataan plaintif kepada BBC dengan artikel-artikel itu sebelum ia diluluskan untuk penerbitan (lihat perenggan 63).

(7) Berhubung pembelaan untuk pelaporan, yang telah pun diplikan; sepatutnya perlu ada amalan keseimbangan oleh defendan-defendan untuk memberikan maklumat yang benar kepada orang ramai berhubung perkara-perkara tentang kepentingan awam untuk mengelakkan reputasi seseorang individu terjejas adalah tidak boleh dikompromi. Fakta bahawa artikel-artikel yang dilaporkan telah dikomen oleh ahli politik yang dianggap mempunyai reputasi baik tidak patut dibezakan dan adalah suatu pertimbangan yang tidak relevan dalam mentafsirkan artikel-artikel dalam konteks guaman fitnah dan berdasarkan prinsip-prinsip kehakiman yang tetap dan hujah-hujah ini dilihat sebagai satu lagi pembelaan yang terdesak di bawah keadaan tersebut (lihat perenggan 65).]

Notes

For cases on libel in newspaper, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 653–657.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142b (refd)

Al-Fagih v HH Saudi Research & Marketing (UK) Ltd [2001] EWCA Civ 1634, CA (refd)

Allen v Flood [1898] AC 1, HL (refd)

Arnold v King Emperor [1914] AC 644, PC (refd)

Astaire v Campling [1966] 1 WLR 34, CA (refd)

A *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315, HC (refd)
B Kalyani v District Collector, Villupuram & Anor (2012) (2) Mad LJ 881 (Mad), HC (refd)
British Steel Corporation v Granada Television Ltd [1981] AC 1096 (refd)
Caswell v Powell Duffryn Associates Collieries Ltd [1940] AC 152, HL (refd)
B *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331, CA (refd)
Chandubhai Jethabhai Desai v The State And Anor AIR 1962 Guj 290 (refd)
Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)
Chong Swee Huat & Anor v Lim Shian Ghee [2009] MLJU 150; [2009] 4 CLJ
C 113, CA (refd)
Collins v Cooper (1902) 19 TLR 118, CA (refd)
Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492; [2010] 5 CLJ 301, HC (refd)
Dato' Seri Hishammudin Tun Hussein v Dato' Seri Anwar Ibrahim [2011] 1 LNS
D 1189, HC (refd)
Datuk Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir Mohamad [1999] 7 CLJ 32, HC (refd)
Datuk Harris Mohd Salleh v Datuk Mohd Shafie Hj Apdal & Ors [2009] 7 MLJ 371, HC (refd)
E *Davis v Shepstone* (1886) 11 AC 187, PC (refd)
Delegal v Highley (1837) 8 C & P 444 (refd)
Gluckstein v Barnes [1900] AC 240,HL (refd)
Halim bin Arsyat v Sistem Televisyen Malaysia Bhd & Ors [2001] 6 MLJ 353, HC (refd)
F *Harrison v Thornborough* (1714) 10 Mod Rep 196 (refd)
Horrocks v Lowe [1975] AC 135, HL (refd)
Hough v London Express Newspaper Ltd (1940) 2 KB 507, CA (refd)
E Hulton & Co v Jones [1910] AC 20, HL (refd)
Hunt v The Star Newspaper Co Ltd [1908] 2 KB 309, CA (refd)
G *Indian Express Newspapers (Bombay) (P) Ltd v UOI* 1995 SC 965, Sc (refd)
Irish International University v New Straits Times Press (M) Bhd & Ors [2011] 9 MLJ 40, HC
JB Jeyaretnam v Goh Chok Tong [1985] 1 MLJ 334 (refd)
Jameel (Mohammed) & another v Wall Street Journal Europe Sprl [2007] 1 AC
H 359, HL (refd)
Janab Sultan Salahuddin Owaisi v Syed Viqaruddin And Anor (2005) Cri LJ 2726, HC (refd)
Jones v Great Western Railway Company [1930] All ER Rep Ext 830 (refd)
Jones v Skelton [1963] 3 All ER 952, PC (refd)
I *Joynt v Cycle Trade Publishing Co* [1904] 2 KB 292, CA (refd)
Kemsley v Foot and aothers [1952] 1 All ER 501, HL (refd)
Liberace v Daily Mirror Newspaper Ltd The Times June 17, 18, 1959 (refd)
London Association for Protection of Trade and another v Greenlands Ltd [1916] 2 AC 15, HL (refd)

Maharashtra State Board of Secondary & Higher Secondary Education v KS Gandhi & Ors (1991) 2 SCC 716 (refd)
Morgan v Odhams Press Ltd [1971] 1 WLR 1239 (refd)
Mills v Spencer (1817) Holt NP 533 (refd)
Newstead v London Express Newspaper Ltd [1940] 1 KB 377, CA (refd)
Parkes v Prescott (1869) LR 4 EX 169 (refd)
Parmiter v Coupland and another (1840) 151 ER 340 (refd)
Pervan v North Queensland Newspaper Co Ltd (1993) 178 CLR 309, HC (refd)
Peters v Broad Lough (1884) 4 TLR 469 (refd)
Phillips v Phillips (1879) 40 LT 815 (refd)
Osborn v Bank of the United States 22 US 738 (1824) (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
RK Anand v Registrar, Delhi High Court (2009) 8 SCC 106, SC (refd)
Raghunath Singh Parmar v Mukandi Lal AIR 1936 All 780, HC (refd)
Rajagopal v Rajan [1972] 1 MLJ 45, FC (refd)
Ratcliffe v Evans [1892] 2 QB 524, CA (refd)
Reynolds v Times Newspapers Ltd and others [2001] 2 AC 127, HL (refd)
Roberts v Gable [2008] 2 WLR 129, CA (refd)
Ross v Hopkins [1909] 2 KB 444 (refd)
Rubber Improvement Ltd v Daily Telegraph Ltd sub nom Lewis v Daily Telegraph Ltd [1963] 2 All ER 151,[1964] AC 234 HL (refd)
S Ashok Kandiah & Anor v Dato' Yalumallai Muthusamy [2011] 1 CLJ 460 (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)
Seymour v Butterworth (1862) 176 ER 166 (refd)
Shobhana Bhartia v Nct of Delhi and Another, 144 (2007) Delhi Law Times 519 [Del HC], HC (refd)
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Sivabalan a/l P Asapathy v The New Staits Times Press (M) Bhd [2010] 9 MLJ 320, HC (refd)
Smith v Chadwick (1884) 9 App Cas 187 (refd)
South Hetton Coal Co Ltd v North-Eastern News Association Ltd [1894] 1 QB 133, CA (refd)
State of Bihar v Lal Krishna Advani (2003) 8 SCC 361, SC (refd)
Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (refd)
Queen, The v Cooper (1846) 88 QB 533 (refd)
Toogood v Spyring (1834) 1 Cr M&R 181 (refd)
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)
Warren v Random House Group Ltd (2007) EWHC 2856 QB (refd)
Weaver v Lloyd (1824) 2 B & C 678 (refd)
Wong Yoke Kong & Ors v Azmi M Anshar & Ors [2003] 4 MLJ 96, HC (refd)

A *Workers' Party v Tay Boon Too; Workers' Party v Attorney General* [1975] 1 MLJ 47 (refd)
Youssoupoff v Metro-Goldwyn-Mayer Pictures, Ltd (1934) 50 TLR 581 (refd)

Legislation referred to

B Defamation Act 1957 ss 8, 12
Federal Constitution art 10
Penal Code ss 377A, 377B, 377C, 377D
Rules of Court 2012

C *N Surendran (Latheefa Koya and Afiq Mohd Noor with him) (Daim & Gamany) for the plaintiff.*
Firoz Hussein Ahmad Jamaluddin (Mohd Hafarizam Harun, Wan Azmir bin Wan Majid and Atasha Syakina bt Juhaidi Yean with him) (Hafarizam Wan & Aisha Mubarak) for the defendants.

D **VT Singham J:**

[1] The plaintiff's claim against the defendants is for libel, under the law of tort being defamation, based on two articles which was published by the E defendants or caused to be published on the front page and at p 10 of the *Utusan Malaysia* newspaper dated 17 January 2012.

The first article which was published on the front page of the *Utusan Malaysia* newspaper dated 17 January 2012 is as follows:

F 'TOLAK ANWAR-HASSAN'

Bekas Pesuruhjaya PAS Selangor, Datuk Dr. Hassan Ali membidas Datuk Seri Anwar Ibrahim kerana mempertikaikan undang-undang berkaitan homoseksual di negara ini.

G Menurut beliau, pendirian Anwar tersebut bukanlah baharu kerana itulah pandangan peribadi dan pegangan asasi Penasihat Parti Keadilan Rakyat (PKR) tersebut.

Oleh itu beliau menggesa rakyat menolak perjuangan Anwar kerana kegiatan tidak bermoral itu jika dihalalkan boleh mencetuskan pergolakan dan perpecahan dalam H masyarakat serta kekacauan dalam negara.

The second article which was published at p 10 of the *Utusan Malaysia* newspaper dated 17 January 2012 is as follows:

'PARASIT ANCAM PAS, ANWAR MESTI DITOLAK'

I HASAN: Inilah salah satu sebab saya tidak boleh bersekongkol dengan Anwar Ibrahim. Inilah sebabnya rakyat Malaysia mesti menolak perjuangan Anwar Ibrahim. Kalau kegiatan gay, lesbian homoseksual dan transgender, itu hendak dihalalkan di Malaysia, saya rasa masyarakat akan bergolak dan berpecah. Saya nampak kekacauan akan berlaku. Ini pandangan saya.

[2] The two alleged defamatory articles published by the defendants were supposedly based on the statement given by the plaintiff during an interview conducted by the British Broadcasting Corporation ('BBC') on 12 January 2012. The plaintiff's statement is as follows:

> We will have to review some of these archaic laws. We Muslims and non-Muslims in Malaysia generally believe and committed to support the sanctity of marriage between man and woman. But we should not be seen to be punitive and consider the archaic laws as relevant. We need to review them. We do not promote either homosexuality in a public sphere or domain. I don't think we even need to make apologies towards that but I think to use this sort of legislation to be punitive, punish innocent people cannot be condoned or tolerated.

[3] Consequently, the plaintiff has pleaded that the defamatory articles and words that have been published in the *Utusan Malaysia* newspaper dated 17 January 2012 had damaged his reputation as the opposition and political leader. Accordingly, the plaintiff has filed this suit against the defendants for damages and injunction.

[4] By the statement of claim dated 20 January 2012 (encl 2), the plaintiff has pleaded, inter alia, and briefly, as follows:

(1) The plaintiff is the opposition leader in the Parliament of Malaysia and a Member of Parliament for Permatang Pauh constituency.

(2) The first defendant is the proprietor, publisher and the printer of the *Utusan Malaysia* newspaper.

(3) The second defendant is the Chief Editor of the 'Utusan Malaysia' newspaper.

(4) On the front page of *Utusan Malaysia* newspaper dated 17 January 2012, the defendants had falsely and maliciously printed and published an article entitled '*Tolak Anwar-Hassan*' (the '*first article*') which is defamatory against the plaintiff. The first article which was published is:

> 'TOLAK ANWAR-HASSAN'
>
> Bekas Pesuruhjaya PAS Selangor, Datuk Dr. Hassan Ali membidas Datuk Seri Anwar Ibrahim kerana mempertikaikan undang-undang berkaitan homoseksual di negara ini
>
> Menurut beliau, pendirian Anwar tersebut bukanlah baharu kerana itulah pandangan peribadi dan pegangan asasi Penasihat Parti Keadilan Rakyat (PKR) tersebut.
>
> Oleh itu beliau menggesa rakyat menolak perjuangan Anwar kerana kegiatan tidak bermoral itu jika dihalalkan boleh mencetuskan pergolakan dan perpecahan dalam masyarakat serta kekacauan dalam negara

(5) On p 10 of the *Utusan Malaysia* newspaper dated 17 January 2012, the defendants had falsely and maliciously printed and published an article entitled '*Parasit ancam PAS, Anwar mesti tolak*' (the '*second article*') which is defamatory against the plaintiff. The second article which was published is:

> 'PARASIT ANCAM PAS, ANWAR MESTI DITOLAK'
>
> HASAN: Inilah salah satu sebab saya tidak boleh bersekongkol dengan Anwar Ibrahim. Inilah sebabnya rakyat Malaysia mesti menolak perjuangan Anwar Ibrahim. Kalau kegiatan gay, lesbian homoseksual dan transgender, itu hendak dihalalkan di Malaysia, saya rasa masyarakat akan bergolak dan berpecah. Saya nampak kekacauan akan berlaku. Ini pandangan saya.

(6) The defamatory words were supposedly based on the statement given by the plaintiff during an interview conducted by the BBC. The statement is as follows:

> We will have to review some of these archaic laws. We Muslims and non-Muslims in Malaysia generally believe and committed to support the sanctity of marriage between man and woman. But we should not be seen to be punitive and consider the archaic laws as relevant. We need to review them. We do not promote either homosexuality in a public sphere or domain. I don't think we even need to make apologies towards that. But I think to use this sort of legislation to be punitive, punish innocent people cannot be condoned or tolerated.

(7) The two defamatory articles that were published in the *Utusan Malaysia* had caused damage to the plaintiff's reputation as an opposition leader and politician in Malaysia.

[5] The plaintiff therefore claims against the defendants:

(a) damages in the sum of RM50,000,000;

(b) aggravated damages;

(c) exemplary damages;

(d) interest at a rate of 8%pa on the damages awarded under para (1) from the date of judgment until the date of full payment of the said sum;

(e) an injunction to restrain the defendants and each of them, whether themselves, their servants or agents or otherwise howsoever from further speaking and publishing or causing to be published the defamatory words or any similar words defamatory of the plaintiff, whether orally or in the print media or on the internet;

(f) costs of this action; and

(g) such further or any other relief as this honourable court shall deem, fit and proper to grant. A

[6] On the other hand, the defendants have, inter alia, denied the plaintiff's claim and have pleaded that the articles published were not defamatory. Further and in the alternative, the defendants have also pleaded the statutory defences, namely, the defence of fair comment, justification and qualified privilege, and also the defence of reportage. B

[7] By the statement of defence dated 28 February 2012 (encl 5), the defendants have denied the plaintiff's claim and have pleaded, inter alia, and briefly, as follows: C

(1) The defendants deny that the words contained in both the articles were defamatory of the plaintiff and/or were published maliciously or falsely and/or with the intention to defame the plaintiff.

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(2) The defendants had raised three statutory defences namely, the defence of fair comment, justification and qualified privilege and a further defence of reportage.

(a) Defence of Justification

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(i) The plaintiff had stated in the BBC news that the current laws on homosexuality are in fact irrelevant punitive and considered to be archaic. The publication in *Utusan Malaysia* was in substance true and justified in accordance with what was said during the interview.

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(ii) The exact transcription of the interview given by the plaintiff to the British Broadcasting Corporation ('BBC') is as follows:

Interviewer:	How far do you want that message of freedom to go because, your case that you have just been acquitted over, that generated a really newly invigorated gay rights movement in your country; there're a lot of people stepped up to battle for that even though you have been acquitted. Are you prepared to take that idea of anti-discrimination as far as gay rights?
DSAI (PLAINTIFF):	We will have to review some of these archaic laws. We Muslims, Non-Muslims in Malaysia generally believe and committed to support the sanctity of marriage between man and woman. But we should not be seen to be punitive and consider the archaic laws as punitive and relevant. We need to review them. We do not promote either homosexuality in a public sphere or domain. I don't think we even need to make apologies towards that. But I think to use this sort of legislation to be punitive, punish innocent people cannot be condoned or tolerated.

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(b) Defence of Fair Comment

(i) The publication of both the articles were made in the interest of public and with regard to the public's right for information and had no intention to defame the plaintiff.

(ii) Both the articles were based on the BBC interview and the press conference by Datuk Dr Hassan Ali ('DW1') and the comments were made in relation to the plaintiff's view on law pertaining to homosexuality.

(c) Defence of Qualified Privilege and Reportage

(i) The articles complaint were published based on the BBC interview in which the exact wording of the interview was from the plaintiff himself;

(ii) The article was also based on the Press Conference given by Datuk Dr Hassan Ali, the former Commissioner of the Parti Islam SeMalaysia (PAS) (DW1);

(iii) The said articles were published without any alteration or embellishment of the words used by Datuk Dr Hassan Ali at the Press Conference on 16 January 2012;

(iv) The said articles were a matter of public interest;

(v) The defendants did not act with malice when publishing the said articles.

(d) Aggravated or Exemplary Damages

(i) The plaintiff is not entitle for aggravated or exemplary damages on the following grounds:

(a) The plaintiff at all material times is entitle to provide the defendants his reply to Datuk Dr Hassan Ali's comments and this would have been reported in the usual way;

(b) The defendants have the duty to publish information as it concerns a public figure and the defendants never had the intention to cause maximum damage and embarrassment to the plaintiff as alleged by the plaintiff;

(c) The readers had legitimate interest in the publication of the said information;

(d) The words published referred to the plaintiff and not to the plaintiffs family;

(e) The defendants have provided legitimate information to the people of Malaysia.

[8] By the reply to the statement of defence, the plaintiff has pleaded as follows:

(a) the defendants have made continuous criticism against the opposition party as well as to the individual through *Utusan Malaysia;*

(b) the critics have no justification and had caused damage to the opposition party and had intended to support the government's party particularly the United Malays National Organisation ('UMNO'); and

(c) the defendants have a close relationship with UMNO.

[9] The statement of agreed facts are as follows:

(a) *plaintif merupakan ketua pembangkang di Parlimen, Ahli Parlimen bagi kawasan Permatang Pauh dan pernah berkhidmat sebagai Timbalan Perdana Menteri dari tahun 1993–1998. Plaintif beralamat di No 11, Jalan Bukit Segambut Taman Bukit, 51200 Kuala Lumpur;*

(b) *defendan pertama adalah sebuah syarikat yang diperbadankan di Malaysia yang mempunyai alamat berdaftar dan alamat perniagaan di 46M, Jalan Lima Off Jalan Chan Sow Lin, Kuala Lumpur. Pada setiap masa yang material, defendan pertama adalah pemilik, penerbit dan pencetak akhbar Utusan Malaysia;*

(c) *defendan kedua adalah seorang individu yang mempunyai alamat di 46M, Jalan Lima Off Jalan Chan Sow Lin, Kuala Lumpur. Defendan kedua, pada setiap masa yang material merupakan ketua penyunting akhbar Utusan Malaysia;*

(d) *pada muka surat hadapan akhbar Utusan Malaysia yang bertarikh 17 Januari 2012 sebuah artikel bertajuk 'Tolak Anwar — Hassan' telah dicetak dan diterbitkan atau telah menyebabkan dicetak dan diterbitkan oleh defendan-defendan terhadap plaintif yang mengandungi perkataan-perkataan yang diadukan seperti berikut:*

> 'TOLAK ANWAR-HASSAN'
>
> Bekas Pesuruhjaya PAS Selangor, Datuk Dr. Hassan Ali membidas Datuk Seri Anwar Ibrahim kerana mempertikaikan undang-undang berkaitan homoseksual di negara ini
>
> Menurut beliau, pendirian Anwar tersebut bukanlah baharu kerana itulah pandangan peribadi dan pegangan asasi Penasihat Parti Keadilan Rakyat (PKR) tersebut.
>
> Oleh itu beliau menggesa rakyat menolak perjuangan Anwar kerana kegiatan tidak bermoral itu jika dihalalkan boleh mencetuskan pergolakan dan perpecahan dalam masyarakat serta kekacauan dalam negara

(e) *pada ms 10 akhbar Utusan Malaysia bertarikh 17 Januari 2012, di bawah*

tajuk 'Parasit ancam PAS, Anwar mesti ditolak', defendan-defendan telah mencetak dan menerbitkan atau telah menyebabkan dicetak dan diterbitkan terhadap plaintif perkataan-perkataan fitnah yang berikut:

PARASIT ANCAM PAS, ANWAR MESTI DITOLAK'

HASAN: Inilah salah satu sebab saya tidak boleh bersekongkol dengan Anwar Ibrahim. Inilah sebabnya rakyat Malaysia mesti menolak perjuangan Anwar Ibrahim. Kalau kegiatan gay, lesbian homoseksual dan transgender, itu hendak dihalalkan di Malaysia, saya rasa masyarakat akan bergolak dan berpecah. Saya nampak kekacauan akan berlaku. Ini pandangan saya.

(f) *akhbar Utusan Malaysia telah diterbitkan dan diedarkan di seluruh Malaysia.*

[10] The issues to be tried as agreed by the parties are as follows:

(a) *sama ada defendan-defendan telah melalui artikel yang dilaporkan di akhbar Utusan Malaysia bertarikh 17 Januari 2012 memfitnah plaintif;*

(b) *sama ada perkataan-perkataan tersebut membawa kepada maksud-maksud dan difahami sebagai mempunyai maksud-maksud sebagaimana yang telah diplidkan di dalam perenggan 7 pernyataan tuntutan;*

(c) *sama ada defendan-defendan boleh mengguna pakai pembelaan justifikasi.*

(d) *sama ada defendan-defendan boleh mengguna pakai pembelaan perlindungan bersyarat dan/atau* 'reportage';

(e) *sama ada defendan-defendan boleh mengguna pakai pembelaan ulasan saksama;*

(f) *jika sekiranya pembelaan perlindungan bersyarat dan/atau ulasan saksama diguna pakai, adakah pembelaan tersebut masih boleh digunakan sekiranya terdapat* 'malice'; *dan*

(g) *jika sekiranya mahkamah mendapati perkataan-perkataan tersebut adalah fitnah, apakah bentuk ganti rugi yang boleh dituntut oleh plaintif.*

[11] In support of his claim, the plaintiff ('PW1') was the sole witness who had testified in court.

[12] In support of the defendants' case, five witnesses were called to testify, namely:

(a)	Datuk Dr Hassan bin Ali	–	DW1
(b)	Professor Shamrahayu bt Ab Aziz	–	DW2
(c)	Datuk Abd Aziz bin Ishak	–	DW3

(d)	En Zulkiflee bin Bakar	–	DW4
(e)	En Saifulnizam bin Mohamad	–	DW5

[13] In defending the plaintiff's claim against the defendants, learned counsel, Dato' Firoz Hussein for the defendants had submitted, inter alia, and briefly, as follows:

(1) The words pleaded in para 4 (b) of the statement of claim are not defamatory of the plaintiff for the following reasons:

> Paragraph 4(b) of the statement of claim is:
>
> 'PARASIT ANCAM PAS, ANWAR MESTI DITOLAK'
>
> HASAN: Inilah salah satu sebab saya tidak boleh bersekongkol dengan Anwar Ibrahim. Inilah sebabnya rakyat Malaysia mesti menolak perjuangan Anwar Ibrahim. Kalau kegiatan gay, lesbian homoseksual dan transgender, itu hendak dihalalkan di Malaysia, saya rasa masyarakat akan bergolak dan berpecah. Saya nampak kekacauan akan berlaku. Ini pandangan saya.

(a) The words do not suggest any wrongdoing by the plaintiff;

(b) There is no suggestion that the plaintiff is a homosexual or is involved on homosexuality;

(c) The words are merely a political exhortation to reject the plaintiff as a politician because of his views;

(d) None of the words, if construed as a whole, bring down the plaintiff's reputation in any way whatsoever.

(2) The plaintiff's statement as a whole clearly meant that in the context of non-discrimination, the existing laws were archaic and should be reviewed so that they are not punitive and to have laws which are punitive of gays or punish innocent people, cannot be condoned.

(3) The plaintiff was advocating the removal of punishment in respect of homosexual conduct. This will ensure that gays would not be discriminated against heterosexuals, their conduct would not be punished under the law. There is complete justification for the use of the word 'menghalalkan' as in the context of the impugned article it means 'permitted'.

(4) The words 'But we should not be seen to be punitive and consider the archaic laws as relevant. We need to review them', clearly meant that:

(a) There was a need to review law which 'discriminated' against the rights of gays;

(b) The law which 'discriminated' against the rights of gays were archaic;

(c) The laws which affected gays should not be seen to be punitive.

(5) The article was a fair comment on a matter of public interest.

(6) The defense of fair comment should be invoked in favour of the defendants for the following reasons:

(i) That the charges on which the alleged libel was based were true and that the alleged libel was made fairly;

(ii) That the alleged libel constituted a comment and not a statement of fact;

(iii) That the alleged libel was made fairly. In this connection reference to s 9 of the Defamation Act 1957 should be made.
Section 9 of the Defamation Act 1957 reads:

> In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

(iv) That the alleged libel was made by Datuk Dr Hassan Ali ('DW1') and the defendants published the same in the honest belief that it was true; and

(v) That the alleged libel was not actuated by malice;

(vi) That the article was on matter which was of public interest.

(7) The article only commented on the fact that the plaintiff disagreed with the existing laws affecting gays, wanted them to be reviewed and wanted them to be not punitive or punish innocent people.

(8) The article reported a comment by DWl in relation to an interview given by the plaintiff to the BBC. The plaintiff's BBC interview was in the public domain and it was clear that DW1's comments tallied with the BBC interview.

(9) Given the urgency of the publication and given the fact that the publication was not defamatory, it is submitted that it was unnecessary to seek the plaintiff's comments.

(10) The defendants are clearly entitled to rely on the defence of reportage because:

(a) There was an ongoing political dispute involving DW1 and PAS, part of Pakatan Rakyat, which is headed by the plaintiff;

(b) The truth of what DW1 uttered is irrelevant as long as the defendants reported it as what he had said at the press conference without addition or embellishment;

(c) The article was a verbatim report of what DW1 uttered at the press conference which he gave;

(d) The defendants had not embellished the words of DW1 uttered at the press conference but reported it in a neutral manner.

(11) The defendants had practiced *responsible journalism* for the following reasons:

(a) The article was not defamatory;

(b) The contents of the article are true;

(c) The article reported a comment by a reputable politician;

(d) The words of DW1 were reported verbatim and in the context of an ongoing dispute;

(e) The article was on a matter of public interest;

(f) The article was neutral and written without embellishment or changes; the article does not contain any serious or defamatory allegations against the plaintiff.

(12) The true construction of the words 'We will have to review some of these archaic laws' uttered by the plaintiff are as follows:

(a) The plaintiff did not deny or reject the idea of anti-discrimination as far as gay rights were concerned;

(b) The plaintiff answered in response to being asked about anti-discrimination and gay rights, that there was a need to review some of these archaic laws.

(13) Nowhere is it pleaded in the statement of claim that the plaintiff is contending that the words meant that the plaintiff wanted to legalise ('menghalalkan') gay, lesbian, homosexual and transgender activities in Malaysia.

(14) As such the plaintiff should not now be permitted to traverse beyond his pleadings and contend for an unpleaded meaning.

(15) It is clearly stated that DW1 criticised the plaintiff because he disputed or called into question laws relating to homosexuality in this country. This statement is not defamatory as it is perfectly acceptable to criticise the plaintiff for calling into question the laws relating to homosexuals in this country.

(16) The defendants did not defame the plaintiff through the publication of the article dated 17 January 2012. The article is not defamatory of the plaintiff.

(17) Alternatively, the defendants have fulfilled the requirement for the defences of *fair comment, justification, qualified privilege and reportage*.

(18) The defendants pray that the plaintiff's claim be disallowed with costs.

[14] In support of his submissions, learned counsel for the defendants has referred to the following authorities:

(a) *Chok Foo Choo @ Chok Kee Lian v The China Press Berhad* [1999] 1 MLJ 371; [1999] 1 CLJ 461;

(b) Defamation Act 1957 — s 8;

(c) *Oxford English Dictionary* — review;

(d) *Oxford English Dictionary* — archaic;

(e) *Kamus Dewan — menghalalkan;*

(f) Penal Code — s 377A–D;

(g) *Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad* [1999] 4 MLJ 58; [1999] 7 CLJ 32;

(h) *Dato' Seri Hishammudin Tun Hussein v Dato' Seri Anwar Ibrahim* [2011] 1 LNS 1189;

(i) *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309;

(j) *Hunt v The Star Newspaper Co Ltd* [1908] 2 KB 319;

(k) *Kemsley v Foot* [1952] 1 All ER 501;

(l) *Chong Swee Huat & Anor v Lim Shian Ghee* [2009] MLJU 150; [2009] 4 CLJ 113;

(m) *S Ashok Kandiah & Anor v Dato' Yalumallai Muthusamy* [2011] 1 CLJ 460;

(n) *Sivabalan a/l P Asapathy v The New Staits Times Press (M) Bhd* [2010] 9 MLJ 320;

(o) *Irish International University v New Straits Times Press (M) Bhd & Ors* [2011] 9 MLJ 40;

(p) *Datuk Harris Mohd Salleh v Datuk Mohd Shafie Hj Apdal & Ors* [2009] 7 MLJ 371;

(q) *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127;

(r) *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492; [2010] 5 CLJ 301;

(s) *Roberts v Gable* [2008] 2 WLR 129;

(t) *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634;

(u) *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] 3 WLR 642;

(v) *Gatley on Libel & Slander* (10th Ed), 2003;

(w) *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147;

(x) *Horrocks v Lowe* [1975] AC 135 (HL); and

(y) *Jameel & Ors v Wall Street Journal Europe SPRL* [2007] 1 AC 359.

[15] In support of the plaintiff's claim, learned counsel for the plaintiff has submitted, inter alia, and briefly, as follows:

(1) The defamatory words state that the plaintiff wished to legalise ('dihalalkan') 'gay, lesbian, homosexual and transgender' activities in Malaysia. As a Muslim leader in a Muslim majority country it is submitted that the allegation is defamatory of the plaintiff.

(2) The defendants must prove that the plaintiff had called for the legalisation of ('dihalalkan') homosexuality in his BBC transcript based upon which the article in Utusan Malaysia was published.

(3) The re-publication of a defamatory statement amounts to defamation.

(4) The defenses of qualified and fair comment are defeated by malice.

(5) DW4 had clearly contemplated that the defendants might be sued and this shows that they had no genuine belief that the said words were true.

(6) The defendants have failed to prove the defense of justification. Whereas qualified privilege and fair comment are defeated by malice.

(7) Therefore, plaintiff prays that his claim be allowed with costs.

[16] In support of his submissions, learned counsel for the plaintiff has referred to the following authorities:

(a) *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461;

(b) *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56;

(c) *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393;

(d) *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334; and

(e) *Workers' Party v Tay Boon Too; Workers' Party v Attorney-General* [1975] 1 MLJ 47.

DECISION

[17] Having heard and seen the witnesses giving evidence and having examined and considered the totality of the evidence with the documents produced by both the parties and admitted, in particular, the publication of the articles on the front page and at p 10 of the *Utusan Malaysia* newspaper dated 17 January 2012 which is reproduced and pleaded in verbatim and upon considering the submissions with the authorities and the research carried out by this court, *the decision of this court is*.

[18] At the outset of delivering this decision, I wish to make this observation:

Role of the Judge

(a) Judicial office is essentially a public trust and therefore must be carried out so as to be meaningful and effective. In this context, this court also wishes to remind itself that the judicial oath which I have taken demands that this court administer justice without being deterred by the personalities named as parties in the matter before this court as 'justice is older than the courts of law'. Therefore, 'justice cannot be administered in the dark or secrecy'. This is an inescapable judicial task and is not an exercise of whim or will.

(b) The sacred seat of justice which I occupy demands that the court administer law 'without fear or favour, affection, or ill will or moral considerations' but within the facts and law. A judge deciding a case should do so without any influence being brought to bear upon him to decide it one way or another by any agency, individual or organisation outside himself. It is of course paramount important that a judge should be able to decide according to the merits of the case without any influence being imposed, except, perhaps, in the form of persuasion during submissions on the facts and the application of the law. Faith in the administration of justice is one of the pillars on which democratic institution function and sustains. To establish that faith, this court must do what is right. Judicial pronouncement must be judicial in nature and should not normally depart from 'sobriety, moderation and reserve'.

(c) As far as this court is concern, so long as the presiding judge or the judicial officer has no material or commercial interest in the outcome of the proceedings or a trial pending before the court, in the sense, he must be 'completely detached, judicial, impartial and independent', there should be no reason which would affect the impartiality of his or her decision. There should be no reason to be concerned what will be the perception of the public in the decision of the court. The decision of the court should never and ever be influenced by any extraneous consideration, such as political, corporate, commercial patronage or private interest. It is essential and important to be mindful that courts reputation for honesty and impartiality to the judicial oath and the sacred seat of justice must be maintained at all times in the discharge of its judicial duty. (*Osborn v Bank of the United States* 9 wheat 738–866).

(d) I am not prepared to compromise on the judicial oath that I have taken upon my elevation to the bench. This court will only act on the facts and the application of the law and not on speculation or personal sentiment in order to find a case or try to make out a case in favour of the plaintiff or the defendants. The chair I am seated is sacred and I will continue to maintain it sacred until this sacred seat is vacated in accordance with the constitutional requirement or if I elect to vacate this sacred seat earlier with approval.

(e) This court, with respect, wishes to reiterate that any mechanical findings or short circuiting of a judicial duty to arrive at a judicial decision would no doubt, and with respect, frustrate the justice of the case and eventually may result in litigants possibly losing confidence in the justice system in this jurisdiction on the ground that something is not right in the administration of justice.

Public confidence in the Judiciary

'The courts' authority — possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral'. (Frankfurter J. in *Baker v Carr, 369 U.S. 186* (1961) at p. 267).

'Public confidence is a necessary condition for the existence of an independent judiciary. It is public confidence that the judiciary is doing justice according to law. It is public confidence that judging is done fairly and neutrally treating parties equally and without the hint of personal interest in the result. It is public confidence that the judiciary operated with a high level of morality. Without public confidence, the judiciary cannot act Public confidence in the judiciary is the most valuable asset the judiciary has. It is also one of the most valuable assets the nation has' (*Tzavan v Minister of Religious Affairs, 40(4) P.D.141,148*).

'The need to ensure confidence does not mean the need to ensure popularity. The need for public confidence is the need to create a feeling among the public that judges act objectively, applying the laws neutrally, according to the system's fundamental values; that judicial activity-advances the national credo and not

judges' own personal credos; that judges are not parry to the state's power struggles, and that they do not fight for their own power but rather to keep democracy intact. Public confidence does not require public agreement with judicial decisions, but rather public confidence in the integrity of those decisions. When judges do law, not just the parties, not just the law, but judges themselves stand on trial' [*5O Harv. L. Rev. 4, 10(1936)*]

It was said by a Judge in another jurisdiction that:

> 'When we (Judges) sit at trial, we also stand trial'.

Chief Justice *Arthur T. Vanderbilt, the Chief Justice of The New Jersey Supreme Court* in his series of lectures delivered in the University of Virginia said:

> it is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of the courts as it affects them, their respect for the law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it.
>
> Judges learned in the law, not merely the law in books but, something far more difficult to acquire, the law as applied in action in the court-room; Judges deeply versed in the mysteries of human nature and adopt in the discovery of the truth in the discordant testimony of fallible human beings; Judges beholden to no man, independent and honest and — equally important — believed by all men to be independent and honest; Judges, above all, fired with consuming zeal to mete out justice according to law to every man, woman and child that may come before them and to preserve individual freedom against any aggression of Government;[ALJ Vol 28, 561–562]

'If there is one principle of cardinal importance in the administration of justice, it is this: the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, even by this court.

It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve'. (Chief Justice S.R. Das of the Supreme Court [AIR 1964 SC 707]).

At the opening of the New Legal Year (12 October 2008), the Lord Chief Justice of England and Wales, *The Rt Hon Lord Igor Judge*, said:

> As Judges we have to be fair and open minded and balanced, independent in spirit, courages to do what is right even when it will be unpopular-perhaps indeed most of all when it will be unpopular-whether with politicians, the executive or the media.
>
> Decisions have to be made. There is no way in which a Judge can avoid making decisions. Moreover many of them have to be made when as a Judge or Magistrate you know that they may be heavily criticised in the media, while you as a Judge or Magistrate know that you must live with your judicial conscience and you

must do right in the face of any potential public criticism, even though this maybe deeply disturbing not only to yourself but, perhaps more important, to your spouse and family.

[19] Accordingly, the findings and decision arrived at by the courts in this jurisdiction can only be determined according to the true facts which had emerged during the trial and the application of the law to the facts. The decision of the court cannot be based on personal sentiment of the presiding judicial officer or judge or in a mechanical fashion or by travelling outside the evidence or taking into consideration extraneous matters.

[20] With the above note, I now proceed to provide my reasons for arriving at my decision in respect of the plaintiff's claim. In order to succeed in his claim under the tort of defamation against the defendants, the plaintiff must prove three elements of the tort of defamation, namely:

(a) that the articles published in the *Utusan Malaysia* newspaper dated 17 January 2012 bares defamatory imputations;

(b) the defamatory statement must refer to the plaintiff; and

(c) the defamatory statement must have been published to third person by the defendants, (this third element is generally known as the 'publication and circulation' principle) (*Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 at p 316).

[21] There are many matters which would make the articles defamatory and it need not be limited to the 'stock formula', such as it is 'calculated to bring into hatred, ridicule or contempt' and the 'phrase is not exhaustive. In some cases, the words used causes them to be shunned or avoided' (*Parmiter v Coupland and another* (1840) 151 ER 340 at p 342, *Youssoupoff v Metro-Goldwyn-Mayer Pictures, Ltd* (1934) 50 TLR 581 at p 584).

[22] On the front page and at p 10 of *Utusan Malaysia* dated 17 January 2012, it was reported and published as if the plaintiff had wished gay, lesbian, homosexual and transgender activities *(kalau kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* is to be legalised and that if it is legalised it would trigger instability and disintegration in society and chaos in the country *(boleh mencetuskan pergolakan dan perpecahan dalam masyarakat serta kekacauan dalam Negara*), At this stage, the question that will arise is, whether the articles when considered in its totality is the views of the plaintiff or the statement given by the plaintiff to BBC which the defendants claim was published based on the views expressed or the statement given by the plaintiff to BBC. On the set of facts in the instant case, there is no dispute that both the articles were printed and published or caused to be printed and published by

the defendants and that it refers to the plaintiff and no other individual and the same is part of the agreed facts and that it was published and circulated throughout Malaysia. In other words, the plaintiff has established and admitted by the defendants that both the articles refer to the plaintiff and that the articles were published and circulated to third person and throughout Malaysia (*Wong Yoke Kong & Ors v Azmi M Anshar & Ors* [2003] 4 MLJ 96). The only issue for this court to decide is, whether the articles are capable of a defamatory imputation against the plaintiff and if the court so finds that it is defamatory, then, whether the defendants have successfully established the statutory defences and the defence of reportage as raised in their statement of defence.

[23] Before directing to the legal aspect of the case, it would be useful to examine the relevant facts which, briefly, are as follows:

(a) the plaintiff had during an interview on 12 January 2012 with British Broadcasting Corporation (BBC) said:

> We will have to review some of these archaic laws. We Muslims and non-Muslims in Malaysia generally believe and committed to support the sanctity of marriage between man and woman. But we should not be seen to be punitive and consider the archaic laws as relevant. We need to review them. We do not promote either homosexuality in a public sphere or domain. I don't think we even need to make apologies towards that. But I think to use this sort of legislation to be punitive, punish innocent people cannot be condoned or tolerated.

(b) whereas the front page story and at p 10 of *Utusan Malaysia* dated 17 January 2012 the defendants had reported, published the views of Datuk Dr Hassan Ali ('DW1') who had said to question posed by En Zulkiflee bin Bakar ('DW4') during the press conference on 16 January 2012 called by DW1 in reference to his sacking as the Commissioner of PAS Selangor by PAS that:

Question and Answer by DW4 to DW1

> Question (DW4):
>
> Apa pandangan Datuk berhubung kenyataan Anwar yang *mempertikaikan* undang-undang berkaitan homoseksual di Negara ini? (Emphasis added.)
>
> Answer (DW1):
>
> Inilah salah satu sebab saya tidak boleh bersekongkol dengan Anwar Ibrahim. Inilah sebabnya rakyat Malaysia mesti menolak perjuangan Anwar Ibrahim. Kalau kegiatan gay, lesbian homoseksual dan transgender, itu hendak dihalalkan di Malaysia, saya rasa masyarakat akan bergolak dan berpecah. Saya nampak kekacauan akan berlaku. Ini pandangan saya.

The plaintiff's statement to BBC on 12 January 2012 is as follows:

> We will have to review some of these archaic laws. We Muslims and non-Muslims in Malaysia generally believe and committed to support the sanctity of marriage between man and woman. But we should not be seen to be punitive and consider the archaic laws as relevant. We need to review them. We do not promote either homosexuality in a public sphere or domain. I don't think we even need to make apologies towards that. But I think to use this sort of legislation to be punitive, punish innocent people cannot be condoned or tolerated.

The first article which was published on the front page story of the *Utusan Malaysia* newspaper dated 17 January 2012 is as follows:

> 'TOLAK ANWAR-HASSAN'
>
> Bekas Pesuruhjaya PAS Selangor, Datuk Dr. Hassan Ali membidas Datuk Seri Anwar Ibrahim kerana mempertikaikan undang-undang berkaitan homoseksual di negara ini
>
> Menurut beliau, pendirian Anwar tersebut bukanlah baharu kerana itulah pandangan peribadi dan pegangan asasi Penasihat Parti Keadilan Rakyat (PKR) tersebut.
>
> Oleh itu beliau menggesa rakyat menolak perjuangan Anwar kerana kegiatan tidak bermoral itu jika dihalalkan boleh mencetuskan pergolakan dan perpecahan dalam masyarakat serta kekacauan dalam negara

The second article which was published on p 10 of the *Utusan Malaysia* newspaper dated 17 January 2012 is as follows:

> 'PARASIT ANCAM PAS, ANWAR MESTI DITOLAK'
>
> HASAN: Inilah salah satu sebab saya tidak boleh bersekongkol dengan Anwar Ibrahim. Inilah sebabnya rakyat Malaysia mesti menolak perjuangan Anwar Ibrahim. Kalau kegiatan gay, lesbian homoseksual dan transgender, itu hendak dihalalkan di Malaysia, saya rasa masyarakat akan bergolak dan berpecah. Saya nampak kekacauan akan berlaku. Ini pandangan saya.

[24] However, soon after the publication of the abovementioned articles and on the same day, the plaintiff had sent a legal notice dated 17 January 2012 through his previous solicitors, M/s Edwin Lim, Suren and Soh to the editor and the managing director of the first defendant. By the said notice, the plaintiff had categorically denied and that the plaintiff had ever or at no point had said gay, lesbian, homosexual and transgender activities is to be legalised *(kalau kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)*, or uttered any words whatsoever to that effect as published by the defendants. The plaintiff had, inter alia, further said that the allegations, and

the articles taken as a whole, are completely false, malicious dan defamatory of him. The plaintiff had further demanded the publisher Utusan Melayu (M) Bhd, the first defendant, inter alia, to withdraw the news item (articles) published on 17 January 2012, apologise and to pay RM50m damages within 48 hours, failing which, the plaintiff would file a legal suit against them as a matter of principle, in order to put an end to dishonest media reporting on important public issues.

The Notice of Demand dated 17.1.2012 is reproduced:-

EDWIN LIM SUREN & SOH
Advocates & Solicitors

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LLB Hons (London) CLP

N. Surendran
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Mondays to Fridays

17th January, 2012 Our Ref: S/DSAI-UM/L/12/0334
Your Ref:

1) The Editor

2) The Managing Director,
Utusan Melayu (Malaysia) Bhd
46M, Jalan Lima **Private & Confidential**
Off Jalan Chan Sow Lin **Registered Post**
55200 Kuala Lumpur

Dear Sirs,

Re : Defamatory and malicious allegations against Leader of the Opposition Datuk Seri Anwar Ibrahim

We act for Datuk Seri Anwar Ibrahim who is the Federal Opposition leader, Leader (Ketua Umum) of Parti Keadilan Rakyat (PKR) and a member of Parliament.

We are instructed that the "Utusan Malaysia" newspaper dated 17th January 2012, of which you are the proprietor and publisher, had published reports, inter alia, as follows:

a. The front page of the headline "Tolak Anwar- Hasan", you published the following:-

> "Bekas Pesuruhjaya PAS Selangor, Datuk Dr. Hassan Ali membidas Datuk Seri Anwar Ibrahim kerana mempertikaikan undang-undang berkaitan homoseksual di negara ini"
>
> "Menurut beliau, pendirian Anwar tersebut bukanlah baharu kerana itulah pandangan peribadi dan pegangan asasi Penasihat Parti Keadilan Rakyat (PKR) tersebut."
>
> "Oleh itu beliau menggesa rakyat menolak perjuangan Anwar kerana kegiatan tidak bermoral itu jika dihalalkan boleh mencetuskan pergolakan dan perpecahan dalam masyarakat serta kekacauan dalam negara"

b. At page 10, under the title "Parasit ancam Pas, Anwar mesti ditolak", you published the following:-

> "HASAN : Inilah salah satu sebab saya tidak boleh bersekongkol dengan Anwar Ibrahim. Inilah sebabnya rakyat Malaysia mesti menolak perjuangan Anwar Ibrahim. Kalau kegiatan gay, lesbian homoseksual dan transgender, itu hendak dihalalkan di Malaysia, saya rasa masyarakat akan bergolak dan berpecah. Saya nampak kekacauan akan berlaku. Ini pandangan saya."

The above allegations purport to be based upon an interview with our client published by the BBC. This is completely false. In the said BBC interview our client whilst saying that archaic laws should be reviewed, stated as follows:-

> "We, Muslim and non Muslim generally believe and are committed to support the sanctity of marriage between man and women in Malaysia. We do not promote homosexuality in the public sphere and domain".

At no point did Datuk Seri Anwar Ibrahim state that "homosexuality should be legalized", or uttered any words whatsoever to that effect.

These allegations, and the article taken as a whole, are completely false, malicious and defamatory of our client. Further, these allegations are calculated to injure our client's credit and reputation as a public figure, and bring him into public scandal, odium and contempt.

Our client is constrained to pursue legal action against you, as you have consistently published mischievous, scurrilous and false allegation against our client and the political opposition in general. Our client brings this action as a matter of principle, in order to put an end to dishonest media reporting on important public issues.

We are instructed to demand, which we hereby do, that:-

1) You publish a full withdrawal and apology in terms to be approved by our client;

2) That the said withdrawal and apology be published prominently in the front page of your newspaper as is the report complained of here;

3) You give our client an undertaking not to further publish this or any similar article or report regarding our client.

In view of extreme seriousness of the allegations and the wide distribution of the newspaper, we are also to demand that you pay our client a sum of **RM50 million** as damages for the injury done to our client's good name and reputation and in vindication of the public's right to fair media reporting.

You are also to pay our client all costs occasioned by this matter by way of indemnity.

A

You are to let us have your reply with 48 hours from the date hereof, failing which we are to commence legal proceeding against you, costs for which you will be fully liable.

B

Yours faithfully,

s.g.d.
N. Surendran
MESSRS EDWIN LIM SUREN & SOH

C

c.c. client

[25] The essential nature of a defamatory statement is that which causes an adverse effect on the person's reputation and how it is viewed by others, the readers of the articles published or caused to be published by the defendants on the front page story and at p 10 of *Utusan Malaysia* newspaper dated 17 January 2012. On the factual matrix of this case, this court is satisfied that the articles published on the front page and at p 10 of *Utusan Malaysia* newspaper dated 17 January 2012 would have the tendency to lower or adversely affect the plaintiff's reputation and expose him to ridicule, or cause him to be shun and injure his reputation in the conduct of the plaintiffs political advancement. Consequently, the article when read in its entirety, inter alia, in their natural and ordinary meaning and admittedly referred to the plaintiff and by reasonable interference cast imputation or gives a defamatory meaning that the plaintiff wished to legalise gay, lesbian, homosexual and transgender activities or is in favour of legalising the same and that consequently, exposing him or which intend to lower him in the estimation of right-thinking members of the society generally and that:

D

E

F

G

(a) he is unfit to be the federal opposition leader of Malaysia;

(b) he is and was at all material times a person who is unfit to hold public office;

(c) he is a Muslim leader who acts and/or hold views inconsistent with the teachings of Islam and/or holds deviant views;

H

(d) he is a disreputable person; and

(e) he is a person of low morals (*Sim v Stretch* [1936] 2 All ER 1237 at p 1240).

I

[26] Based on the articles published by the defendants which is serious in nature, this court is of the considered view that the plaintiff's reputation as the federal opposition leader of Malaysia would be gravely affected and has the

effect of lowering the plaintiff in the estimation of right-thinking members of the public or society generally (*Parmiter v Coupland and another* (1840) 151 ER 340 at p 342, *Sim v Stretch* [1936] All ER 1237 at p 1240, *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461, *B Kalyani v District Collector, Villupuram & Anor* (2012) (2) Mad LJ 881 (Mad)). Defamation constitutes an injury to reputation. Reputation is valued by individuals for it affects their self-esteem and their standing in the community. Where reputation is traduced by a libel 'the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights'. (*Ratcliffe v Evans* [1892] 2 QB 524, per Bowen LJ at p 528). In other words, the question is whether the statement complained of would tend to bring the plaintiff into contempt, hatred or ridicule, or to injure his character and this is a question of fact. (*South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at p 138). In the present case, the articles and the words published is capable of bearing a defamatory meaning and based upon the articles published, it is defamatory of the plaintiff. It is important to consider that the plaintiff has denied that he had ever said or had expressed his views that gay, lesbian, homosexual and transgender activities should be legalised *(kalau kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* in Malaysia and the plaintiff's version is supported by the plaintiff's statement to the BBC to the question posed which is reproduced and is not disputed by the defendants. For easy reference, the question posed, the plaintiff's reply to the BBC, and the articles are once again reproduced:

> Q: How far do you want that message of freedom to go because, your case that you have just been acquitted over, that generated a really newly invigorated gay rights movement in your country; there're a lot of people stepped up to battle for that even though you have been acquitted. Are you prepared to take that idea of anti-discrimination as far as gay rights?

The plaintiff's statement to the BBC:

> We will have to review some of these archaic laws. We Muslims and non-Muslims in Malaysia generally believe and committed to support the sanctity of marriage between man and woman. But we should not be seen to be punitive and consider the archaic laws as relevant. We need to review them. We do not promote either homosexuality in a public sphere or domain. I don't think we even need to make apologies towards that. But I think to use this sort of legislation to be punitive, punish innocent people cannot be condoned or tolerated.

Whereas the articles published at the front page of *Utusan Malaysia* dated 17 January 2012 states:

'TOLAK ANWAR-HASSAN'

> Bekas Pesuruhjaya PAS Selangor, Datuk Dr. Hassan Ali membidas Datuk Seri Anwar Ibrahim kerana mempertikaikan undang-undang berkaitan homoseksual di negara ini
>
> Menurut beliau, pendirian Anwar tersebut bukanlah baharu kerana itulah pandangan peribadi dan pegangan asasi Penasihat Parti Keadilan Rakyat (PKR) tersebut.
>
> Oleh itu beliau menggesa rakyat menolak perjuangan Anwar kerana kegiatan tidak bermoral itu jika dihalalkan boleh mencetuskan pergolakan dan perpecahan dalam masyarakat serta kekacauan dalam negara

Whereas the articles published at the p 10 of *Utusan Malaysia* dated 17 January 2012 states:

> 'PARASIT ANCAM PAS, ANWAR MESTI DITOLAK'
>
> HASAN: Inilah salah satu sebab saya tidak boleh bersekongkol dengan Anwar Ibrahim. Inilah sebabnya rakyat Malaysia mesti menolak perjuangan Anwar Ibrahim. Kalau kegiatan gay, lesbian homoseksual dan transgender, itu hendak dihalalkan di Malaysia, saya rasa masyarakat akan bergolak dan berpecah. Saya nampak kekacauan akan berlaku. Ini pandangan saya.

[27] Be that as it may, this court is not in agreement, with respect, with the submissions of Dato' Firoz Hussein, learned counsel for the defendants that the word 'dihalalkan' has to be expressly pleaded under one of the sub-headings in para 7 of the statement of claim in order for the court to construe the meaning of the articles. It cannot be denied that it is the defendants who had published the words 'hendak dihalalkan' and the same has been reproduced and pleaded being the impugned articles and that cannot be disputed. The relevance of the complaint is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be said in issue (*Phillips v Phillips* (1879) 40 LT 815 at p 821). The plaintiff has stressed that he did not say that he wished to '*dihalalkan* gay, lesbian, homosexual dan transgender activities in Malaysia' as published by the defendants. In it is crystal clear what the plaintiff said to BBC and the same is reproduced:

> We will have to review some of these archaic laws. We Muslims and non-Muslims in Malaysia generally believe and committed to support the sanctity of marriage between man and woman. But we should not be seen to be punitive and consider the archaic laws as relevant. We need to review them. We do not promote either homosexuality in a public sphere or domain. I don't think we even need to make apologies towards that. But I think to use this sort of legislation to be punitive, punish innocent people cannot be condoned or tolerated.

[28] The plaintiff had only said that the law on homosexuality have to be reviewed and had no time said or raised the issue that gay, lesbian, homosexual

and transgender activities in Malaysia has to be legalised *(kalau kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)*. In any event and even taking the plaintiff's statement further, it does not mean that the law on homosexuality will necessarily be reviewed as a matter of right. It was only the views of the plaintiff that the laws on homosexuality be reviewed for which he has given reasons as to why there is a need to review them and he has also qualified his views for the review by stating:

> We Muslims and non-Muslims in Malaysia generally believe and committed to support the sanctity of marriage between man and woman.
>
> We do not promote either homosexuality in a public sphere or domain. I don't think we even need to make apologies towards that. But I think to use this sort of legislation to be punitive, punish innocent people cannot be condoned or tolerated.

Therefore, the words 'if gay, lesbian, homosexual and transgender activities to be legalised *(kalau kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* did not arise in the plaintiff's statement to BBC under any circumstances and the plaintiff's statement to the BBC had been taken out of context as if the articles published by the defendants is based on the plaintiff's statement to the BBC. This court wishes to reiterate that the plaintiff's statement when read as a whole had merely suggested his views of the necessity of having to review the law on homosexuality in so far to the harshness of the punishment, especially, when innocent people are punished and that it cannot be condoned and tolerated. Accordingly, the plaintiff's statement when read as a whole is crystal clear what the plaintiff said and the defendants have admitted that the plaintiff did not say that homosexuality should be legalised. In the circumstances, this court is of the considered view and wishes to reiterate that the articles published by the defendants is capable of conveying or bearing a defamatory meaning and this court is satisfied that the words published are in fact defamatory of the plaintiff.

In *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461, Gopal Sri Ram JCA later FCJ said at pp 374–375 (MLJ); 466–467 (CLJ):

> It cannot, I think, be doubted that the first task of a court, in an action for defamation, is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published. As Lord Morris put it in *Jones v Skelton* [1963] 3 All ER 952 at p 958:
>
> > The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include

> any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory (see *JB Jeyaretnam v Goh Chok Tong* [1985] 3 MLJ 334.) Richard Malanjum J, in an admirable judgment in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393 collected and reviewed the relevant authorities upon this branch of the subject and I would, with respect, expressly approve the approach adopted by him.

[29] The plaintiff's complaint is that as a result of the impugned articles, the plaintiff has been defamed as he did not say that he wished gay, lesbian, homosexual and transgender activities *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* to be legalised. This court finds that the articles read as a whole clearly supports, in the natural and ordinary meaning of a right thinking member of the society generally that the plaintiff is inclined towards legalising gay, lesbian, homosexual and transgender activities *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* which is not true and is capable of a bearing defamatory meaning which gives rise to defamatory imputation and is defamatory of the plaintiff and that he is a person who:

(a) he is unfit to be the federal opposition leader of Malaysia;

(b) he is and was at all material times a person who is unfit to hold public office;

(c) he is a Muslim leader who acts and/or hold views inconsistent with the teachings of Islam and/or holds deviant views;

(d) he is a disreputable person; and

(e) he is a person of low morals.

[30] This court is of the considered view that the articles published cannot be reconciled nor does it commensurate or is it proportionate with the plaintiff's statement to BBC but it is rather a distorted and incorrect version and obviously taken out of context thereby giving the readers or the public generally that the plaintiff by implication wished to legalise gay, lesbian, homosexual and transgender activities *(kegiatan gay, lesbian, homoseksual dan*

transgender itu hendak dihalalkan di Malaysia) which is not true. There is no basis even to start the article with the word 'if and then having had caused the damage to the plaintiffs reputation, the defendants attempt to take shield that the defendants had just published what DW1 had said and then continue to stress that what the defendants had published was that 'if gay, lesbian, homosexual and transgender activities *(kalau kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* is to be legalised, it woud trigger instability and disintegration in society and chaos in the country *(boleh mencetuskan pergolakan dan perpecahan dalam masyarakat serta kekacauan dalam Negara)*.

The articles published by the defendants has a purpose of its own in so far as the defendants are concern and the only reasonable inference that can be drawn when the articles are read as a whole in their natural and ordinary meaning is to give rise to a defamatory imputation that the plaintiff is condoning gay, lesbian, homosexual and transgender activities *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* to be legalised which is not true under the circumstances (*Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56, *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 at p 316, *Rajagopal v Rajan* [1972] 1 MLJ 45). In other words, the law examines only the tendency of the words used, not the actual effect. The test is, whether a right thinking person or society generally would construe the words or articles in their ordinary meaning in the sense that there is a move or inclination towards legalising gay, lesbian, homosexual and transgender activities in this country and consequently, lowering the reputation of the plaintiff. In other words, whether the right thinking members of the society generally would understand the articles in a defamatory sense as stated above. (*Sims v Stretch* [1936] 2 All ER 1237). On the facts and the construction given as above to the articles, both the articles are capable of defamatory meaning and it is defamatory of the plaintiff. In the circumstances, the defendants must accept responsibility for the defamatory articles which was published against the plaintiff.

In *Jones v Skelton* [1963] 3 All ER 952 Lord Morris said at p 958:

> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v Daily Telegraph Ltd*). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

In *Lewis v Daily Telegraph* [1964] AC 234 (HL), Lord Reid said at pp 258–259:

> There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of world affairs.

'Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question'. [(see also *Mark Ignatius Uttley @ Mark Ostyn v Wong Kam Hor & Anor* [2002] 4 MLJ 371; [2002] 8 CLJ 628, *Cristofori Music Pte Ltd v Robert Piano Co Pte Ltd* (1999) 1 SLR(R) 562)].

"He must remember that the court is a temple of justice and the advocate at the bar as well, as the judge upon the bench are equally ministers in that temple. The object of both should be the attainment of justice. Now justice is to be reached only through the ascertainment of truth and it must not be forgotten that the advocate as well as the judge are both together concerned in this search for truth. The pursuit is indeed a noble one and honoured are those who are the instruments engaged in it.

Let your zeal be as warm as your heart's blood, but let it be tempered with discretion and with self-respect; let your independence be firm, uncompromising, but let it be chastened with per-sonal humility; let your love of liberty amount to a passion, but let it not appear to be a cloak for maliciousness. (per PN Bhagwati J (as he then was) in *Chandubhai Jethabhai Desai v The State And Anor*)

[31] Be that as it may, the least the defendants should have done was to publish a correction or by way of clarification publish the whole of the plaintiff's statement upon receiving the legal notice dated 17 January 2012 from the plaintiff's solicitors. Regrettably, the defendants chose to disregard the legal notice despite the golden opportunity having been given to the defendants, inter alia, to publish an apology. If the defendants were genuinely of the believe of the truth or was not motivated with malice, they should have replied to the said legal notice by making proposal or proposals to the plaintiff with the view to publish and to clarify the articles which had been published but instead had permitted the article to remain in their newspaper permanently which would bring a permanent stigma to the plaintiff which could only be erased by judicial intervention. Accordingly, if the clarification was done when it was brought to the notice of the defendants that the articles were not true and did not reflect on what the plaintiff had said to the BBC, perhaps, this court could have taken into account the clarification in determining the plaintiffs claim. Regretablly, and as stated above, the defendants did not act professionally as expected of the press, neither did they practice 'responsible

journalism' when the defendants did not even bother to amend the articles immediately with any proposal or proposals to resolve the plaintiffs claim amicably but chose to remain and comfort themselves by taking shield that the articles published were what DW1 had said to DW4. The clarification or correction could have arguably eliminated any adverse perception or imputation on the plaintiff which on the factual matrix is found to be defamatory of the plaintiff.

'The offer of amends regime provides, as it was supposed to, a process of conciliation. It is fundamentally important that when an offer has been made, and accepted, any claimant knows from that point on that he has effectively 'won'. He is to receive compensation and an apology or correction. In any proceedings which have to take place to resolve outstanding issues, there is unlikely to be any attack upon his character. The very adoption of the procedure has therefore a major deflationary effect upon the appropriate level of compensation. This is for two reasons. From the defendant's perspective he is behaving reasonably. He puts his hands up, and accepts that he has to make amends for his wrongdoing. As to the claimant, the stress of litigation has from that moment at least been significantly reduce'. (*Nail v News Group Newspapers Ltd and others*; *Nail v Jones and another* [2005] All ER 1040 at p 1049).

[32] On the totality of the evidence, the articles which was published by the defendants which imputes to the plaintiff as if he wished gay, lesbian, homosexual and transgender activities *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* to be legalised are not warranted by the facts and leaves much to be desired on the bona fide of the defendants or DW3. What Zulkifli Bakar ('DW4') had testified is that 'they are all politically motivated suits' as recorded in the notes of evidence which is:

> Kita menghadapi banyak saman yang kita anggap berunsur politik. Begitu juga dalam kes ini.

So it is not so much that the defendants were concerned with the truth of the articles but the fact is that they are saying that they have been sued for political reasons and that the maker of the statement has not been sued. The fact that the plaintiff has the right or to elect to proceed against DW1, does not, however absolve the defendants for having repeated the articles by publishing the defamatory articles of the plaintiff. (*Delegal v Highley* (1837) 8 C & P 444, *Mills v Spencer* (1817) Holt NP 533). In an action for defamation in respect of an article published in a newspaper, the proprietor, editor, the writer, the journalist and the publisher of the newspaper are liable to be sued and there is no requirement in law that the person who opined must also be sued. The press should have no greater power in impressing or misleading the minds of the people when compared to the reputation of an individual. It is essential that journalist, editors and publishers should take great care before any article which

tends to harm the reputation of an individual is published. Reckless articles which contain insinuation or comments on the reputation of an individual are to be avoided.

[33] This court is, with respect, unable, to construe that the articles published by the defendants had merely construed that the plaintiff had disagreed with the existing laws affecting gays and he wanted them to be reviewed and not to be punitive or punish innocent people as contended by learned counsel for the defendants. If the defendants require this court to construe the articles in the fashion as contended above and which if it construed in that fashion the articles as a whole, it would have to be read out of context and it would amount to giving a distorted construction or importing words into the articles which is not the function of this court. Accordingly, there is no reason why the defendants did not publish the articles in the same fashion or words or language as being contended presently and as pleaded in their defence as an afterthought and not otherwise as published.

[34] This court wishes to make it clear that this is not a case where there are other reasonable interpretations which could be given to the articles but the only bad one has been seized upon to give a defamatory sense to the articles but the only reasonable inference as that can be given in its natural and ordinary of a right thinking member of the society generally is that the plaintiff wished to legalising or is inclined towards gay, lesbian, homosexual and transgender activities in Malaysia *(kalau kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)*.

In *Jones v Great Western Railway Company* [1930] AC 152 Lord McMilllan said at p 202:

> An inference in the legal sense is a deduction from the evidence and if it is a reasonable deduction, it may have the validity of proof.

In *Caswell v Powell Duffryn Associates Collieries Ltd* [1940] AC 152 at pp 186–170, Lord Reid said:

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability but if there are no positive proved facts from which the inference can be made the method of inference fails and what is left is mere speculation or conjecture.

In *Maharashtra State Board of Secondary & Higher Secondary Education v KS Gandhi & Ors* (1991) 2 SCC 716 at p 748, the Supreme Court said:

A Inference from the evidence and circumstances must be carefully distinguished from conjecture or speculation. The mind is prone to take pleasure to adopt circumstances to one another and even in straining them a little to force them to form parts of one connected whole. There must be evidence, direct or circumstantial, to deduce necessary inference in proof of the facts in issue. There can be no inference unless there are objective facts directs or circumstantial from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred as much as practical as if they had been actually observed. In other cases the inferences do not go beyond reasonable probability. If there are no positive true facts, oral, documentary or circumstantial from which the inference can be made, the inference fails and what is left is mere speculation or conjecture.

[35] As much as the readers or the public have legitimate interest in the publication of the said information as pleaded in the statement of defence, the readers and the public should not also be misled or be given information which is not true or incorrect and which did not reflect or commensurate with the statement given by the plaintiff to the BBC which was not published in the *Utusan Malaysia* on the same date on 17 January 2012. The readers and the public have also a legitimate expectation to be informed of the actual or true statement of the plaintiff to BBC as without providing the plaintiff's statement given to BBC, it would naturally give an impression as if the plaintiff had said that he wished gay, lesbian, homosexual and transgender activities to be legalised *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* and if that is permitted, it would trigger instability and disintegrated in society and create chaos in the country *(boleh mencetuskan pergolakan dan perpecahan dalam masyarakat serta kekacauan dalam Negara)*. The articles must be read as a whole without any segment and not isolate the defamatory statement.

[36] There are several countries which have de-criminalised defamation or have limited the impact of criminal defamation laws like doing away or abolishing the possibility of imprisonment and that does not mean that those countries are supporting or condoning the commission of defamation offences or legalising defamation. Surely in the respectful view of this court that the plaintiff's statement was not meant and could not by any stretch of the imagination be construed that the plaintiff wished gay, lesbian, homosexual and transgender activities to be legalised *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* or wished to condone the offence or had desired to promote gay, lesbian, homosexual and transgender activities to be legalised *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* but for a fact that the plaintiff was merely concerned and had expressed his views on the imposition of harsh sanctions on innocent person. There was no basis to publish even to the extend by publishing that if it is to be legalised it would trigger instability and disintergrated in society and chaos in the country *(boleh mencetuskan*

pergolakan dan perpecahan dalam masyarakat serta kekacauan dalam Negara). The assertion in the article that if gay, lesbian, homosexual and transgender activities to be legalised *(kalau kegiatan gay, lesbian, komoseksual dan transgender itu hendak dihalalkan di Malaysia)* as published by the defendants is devoid of foundation or was formulated in bad faith. Accordingly, the finding by this court of bad faith is further reinforced upon considering the relationship between the first defendant and the shareholders and the percentage of shares owned by the plaintiff's political opponent, (UMNO) in the first defendant's business and the evidence on behalf of the defendants appears to be scattered, unstable and unsupported.

[37] The articles are not true and is defamatory of the plaintiff and it contains, expressly or by imputation, a statement of expression of opinion which would lower the plaintiff in the estimation of a reasonable reader, who had no knowledge of the actual statement opined by the plaintiff to the BBC. In this context, the defendants are strictly liable of the articles whether it originated from DW1 or the defendants are merely repeating it as as publishers as every republication of the libel is a new libel and the defendants as publisher and editor respectively are answerable for their act, to the same extent as if the calumny originated from or merely repeating it as the defendants have no right to repeat the statements or assertion through publication which is without justification. The plaintiff has established his claim against the defendants as pleaded (*Raghunath Singh v Mukandi Lai* AIR 1936 All 780 at p 785, *Rubber Improvement Ltd v Daily Telegraph sub nom Lewis v Daily Telegraph* [1964] AC 234 at p 283).

'If a man gives a copy of his speech to another to publish, he is answerable as a publisher'(*Parkes v Prescatt* (1869) LR 4 EX 169 at p 178).

'If the law were, otherwise, it would in many cases throw a shield over those who are the real authors of libels and who would seek to defame others under what would then be the safer shield of intermediate agents'. (Lord Denman CJ in *The Queen v Cooper* (1846) 88 QB 533) (*Parkes v Prescott* (1869) LR 4 EX 169 at p 178).

[38] On the other hand, it is also no defence to show that the defendants did not intend to defame the plaintiff if responsible or right thinking people of the society generally would think the articles or language to be defamatory of the plaintiff. (*Hulton (CE) & Co v Jones* [1910] AC 20 at pp 23–24, *Youssoupoff v Metro-Goldwyn-Mayer Pictures, Ltd* (1934) SO TLR 581 at p 584, *Newstead v London Express Newspaper Ltd* [1940] 1 KB 377, *Hough v London Express Newspaper Ltd* [1940] 2 KB 507, *Ross v Hopkins* [1909] 2 KB 444).

[39] It is also no defence to say that people may not believe the imputations to be true.

In *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, Lord Morris of Borthy Gost had expressed agreement with the observations made by Goddard LJ in *Hough v London Express Newspaper Ltd* [1940] 2 KB 507, where it was said:

> If words are used which impute discredible conduct to my friend he had been defamed to me; although I do not believe the imputation and may even know that it is untrue.

[40] No newspaper should succumb to political pressure by reporting or publishing articles or words which is without justification or verification to enhance the circulation or business of the newspaper or to victimise the plaintiff or for an ulterior object, thus tending to lower his prestige and image in the eyes or estimation of right-thinking members of the society as the same is per se defamatory (*Lewis v Daily Telegraph Ltd* and *Rubber Improvement Ltd v Daily Telegraph sub nom Lewis v Daily Telegraph* [1963] 2 All ER 151 at p 161).

> the test of defamatory nature of a statement words or article is its tendency to excite against the plaintiff the adverse opinion or feelings of other persons. The typical form of defamation is an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct … (*Sim v Strecth* [1936] 2 All ER 1237 (HC) at p 1240).

In *Seymour v Butterworth* [1862] 176 ER 166 Cockburn CJ said at p 168:

> It was not disputed that the public conduct of a public man might he discussed with the fullest freedom. It might be made the subject of hostile criticism and of hostile animadversions, provided that the language of the writer was kept within the limits of an honest intention to discharge a public duty, and was not made a means of promulgating slanderous and malicious accusations.

[41] By reasons of the words published on 17 January 2012 at the front page story and at p 10 of the *Utusan Malaysia*, the plaintiff has been injured in its credit and reputation and has been bought into public scandal, odium and contempt. The plaintiff is the leader of the opposition and his reputation may well be gravely comprised by imputations mentioned in the articles published for which the defendants must be prepared to accept the legal consequences.

[42] As to the reply on the plaintiff's behalf to the statement of defence that:

(a) the defendants have made continuous criticism against the opposition party as well as to the individual through *Utusan Malaysia*;

(b) the critics have no justification and had caused damage to the opposition party and had intended to support the government's party particularly the United Malays National Organisation (UMNO).

This court, with respect, should not and would not be influenced or consider

any alleged criticism as pleaded in paras (a)–(b) of the reply against the opposition party or any individual in the reply. The plaintiff's present claim is personal to him as an individual and is not filed on behalf of the opposition party or any other individual. Therefore, the decision of this court is based and must be confined only to the admissible evidence where the articles had affected the plaintiff's reputation and not based on hypothesis or conjecture or concerning the opposition party or any other individual.

[43] In conclusion, this court wishes to reiterate that the articles published by the defendants against the plaintiff when read in its ordinary and natural meaning, is capable of an inference that the plaintiff had wished gay, lesbian, homosexual and transgender activities to be legalised in Malaysia *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* and if that is done, it would trigger instability and disintegration in society and chaos in the country *(boleh mencetuskan pergolakan dan perpecahan dalam masyarakat serta kekacauan dalam Negara)*. This court is of the considered view that both the articles are capable of a defamatory meaning and it is defamatory of the plaintiff.

DEFENCES

[44] As for the three statutory defences pleaded by the defendants, namely, *justification, fair comment, and qualified privilege* and also *reportage*, the findings of this court is.

[45] The defendants have denied that the words bore or were understood to bear or were capable of bearing the meanings pleaded in para 7 of the statement of claim and have denied every allegation contained in the para 8 of the statement of claim.

[46] As for the defence of 'justification', the defendants have failed to provide that the articles published were true in substance and effect. In other words, the defence of justification requires the defendants to prove the same to be true in substance or not materially different from the truth. However, in the present case, learned counsel Dato' Firoz Hussein, for the defendants during the course of his oral submissions had conceded and as pleaded in the statement of defence that the plaintiff did not in his statement to the BBC had ever said that he wished or had promoted gay, lesbian, homosexual and transgender activities to be legalised *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* but however, the defendants have attempted to take shield by submitting that the articles published was the views of DW1. At this stage, it is important to state that the defendants as the publisher and editor respectively owe a duty to the public at large and to the plaintiff to have verified the truth of what was said by DW1 in reference to the plaintiff's statement to

BBC before the articles were published and not be influenced merely publishing the articles under the guise of public interest where the articles may eventually turn out to be untrue or was untrue at the time of the publication. The plaintiff had never in his statement or at any point of time to the BBC even suggested or indicated that he wished gay, lesbian, homosexual and transgender activities to be legalised or was inclines towards legalisation *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* or had ever condoned gay, lesbian, homosexual and transgender activities to be legalised *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* in this country which the defendants had failed and in their professional duty as the publisher and/or editor of the articles to carry our 'responsible journalism' for which the defendants must be prepared to accept and face the legal consequences if the court finds the articles in accordance with settled judicial principles to be defamatory of the plaintiff unless the defence pleaded are accepted by the court. This court is satisfied on the factual matrix of the present case and based on the question posed to DW1 by DW4 as contained at p 10 of the *Utusan Malaysia* dated 17 January 2012 that the defendants had no genuine belief in its truth of what is stated by DW1. (*S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173, *Halim bin Arsyat v Sistem Televisyen Malaysia Bhd & Ors* [2001] 6 MLJ 353). This is further supported by the evidence by DW4 of his concern and reservation of having to publish the article which he had brought to the attention of DW3 at the meeting of the editors and sub-editors and considering the evidence of DW4 in its totality. Justification must be truth 'in substance and effect' (*Weaver v Lloyd* (1824) 2 B & C 678 at p 679). In the absence of any genuine belief in the truth of the articles is also evidence of malice, for the defendants, DW3 cannot have a proper motive in saying what he did is believed to be true when considering DW4's evidence of his views at the meeting of the editors and sub-editors chaired by DW3 and that the concern of DW4 should have trigged DW3 that there is something that is not right in the articles and it was not safe for publication without verification. At that stage DW3 ought to have immediately called for verification from the plaintiff or considered and read the plaintiff's statement to the BBC instead of being inconsiderate and giving total disregard to the concern of DW4 before DW3 had approved it for publication. Mere believe in the truth of the article cannot be the test for justification. If that is so, it would be a dangerous proposition in law in which it would place the good reputation of an individual 'at the mercy of the credulity or indifference of every reckless or negligent reporter, editor or publisher'. There is no evidence that DW3 had taken all reasonable or genuine steps or precaution and then formed a reasonable and well grounded belief in the truth of the articles before it was approved for publication.

[47] This court is of the considered view, with respect, that it is not the function or the duty of the readers or the public to investigate or to look for the facts of the plaintiff's statement given to BBC when they read the articles

published by the defendants. This requirement by the defendants to publish the plaintiff's statement during the BBC interview which has been reproduced above together with the two articles published is pertinent and this duty is owed by the defendants to the public and the society generally so that the readers and the public will be able to form their own views fairly and on the proper balance upon considering the plaintiff's statement to BBC when compared to the two bare articles published by the defendants which did not contain the truth of the plaintiff's statement to BBC. DW1's statement or answer to DW4's question is clearly distinguishable from the facts upon which the publication is based, ie the plaintiff's statement to BBC and the statement of DW1 which was an answer to the DW4's question during the press conference called by DW1 on 16 January 2012. Accordingly, the defence of justification is not open to the defendants and is rejected.

[48] As to the defence of 'fair comment', this court finds that the defendants have failed to establish that the articles published were 'fair comment'. While the publication may have been on a matter of public interest, the defendants did not state or publish or reproduce the entire statement made by the plaintiff during the BBC interview on 12 January 2012 together with the articles published by the defendants:

The plaintiff's interview with BBC on 12 January 2012 in reference to the articles which was published by the defendants is reproduced:

Interviewer:	How far do you want that message of freedom to go because, your case that you have just been acquitted over, that generated a really newly invigorated gay rights movement in your country; there're a lot of people stepped up to battle for that even though you have been acquitted. Are you prepared to take that idea of discrimination as far as gay rights?
DSAI (PLAINTIFF):	We will have to review some of these archaic laws. We Muslims, Non-Muslims in Malaysia generally believe and committed to support the sanctity of marriage between man and woman. But we should not be seen to be punitive and consider the archaic laws as punitive and relevant. We need to review them. We do not promote either homosexuality in a public sphere or domain. I don't think we even need to make apologies towards that. But I think to use this sort of legislation to be punitive, punish innocent people cannot be condoned or tolerated.

Whereas, the statement of Datuk Dr Hassan Ali ('DW1') during the press conference which was held on 16 January 2012 in relation to his sacking as Commisioner of PAS Selangor by PAS to the question posed by DW4 and published in the front page of *Utusan Malaysia* and at p 10 of *Utusan Malaysia* dated 17 January 2012 is reproduced:

Question (DW4):

Apa pandangan Datuk berhubung kenyataan Anwar yang *mempertikaikan* undang-undang berkaitan homoseksual di Negara ini? (Emphasis added.)

Answer (DW1):

Inilah salah satu sebab saya tidak boleh bersekongkol dengan Anwar Ibrahim. Inilah sebabnya rakyat Malaysia mesti menolak perjuangan Anwar Ibrahim. Kalau kegiatan gay, lesbian homoseksual dan transgender, itu hendak dihalalkan di Malaysia, saya rasa masyarakat akan bergolak dan berpecah. Saya nampak kekacauan akan berlaku. Ini pandangan saya.

[49] There is no admissible evidence to support that the entire statement made by the plaintiff to the BBC on 12 January 2012 as pleaded in para 8 of the statement of claim was widely known to the public or the readers of *Utusan Malaysia* on 17 January 2012 as a whole and not merely if at all to a certain group or class of people who may or may not have knowledge of the plaintiff's statement to the BBC. In fact, during the oral submissions and clarifications when questioned by this court on 27 December 2012, learned counsel Dato' Firoz Hussein for the defendants had responded by submitting and the same is reproduced:

MAHKAMAH:

Assuming a situation arises that a reader does not know about this interview, just reads Utusan Malaysia, what is their opinion of the articles? Very important with respect. You are assuming that everybody knows the background of this interview and then this article is published in the newspaper.

PEGUAM DEFENDAN-DEFENDAN:

Yes.

MAHKAMAH:

I just open the newspaper. I'm just reading this. I do not know what happened before that? With respect

PEGUAM DEFENDAN-DEFENDAN:

Well My Lord with respect if someone open the Utusan Melayu and looked at the words itself Your Lordship will see that at page 4 of the bundle, Bundle B.

MAHKAMAH:

yes.

PEGUAM DEFENDAN-DEFENDAN:

Sebenarnya pandangan Anwar bukan hanya di Mumbai melalui BBC itu sahaja kalau tak salah itu pandangan peribadi Anwar, so that's the BBC interview was already mentioned in the article. So the person who just read the article would be drawn to that fact that this is what he said in the BBC interview in Mumbai. *So if they wanted to ascertain further they could go to the BBC website and download the interview which was available to everybody.* (Emphasis added.)

MAHKAMAH:

No, the first impression when I read, that is the point. Bukan, saya nak pergi buat siasat.

PEGUAM DEFENDAN-DEFENDAN:

But the first impression when one reads is the actual article refers to the fact that the statement was made in the BBC. So they would have, they would be aware that such a statement was made in a BBC interview. And this was the response to it. They wouldn't be interpreting it in a way to say that this was a statement just made by Dr Hassan Ali out of the blue but they would be interpreting it as his response to what Anwar had said.

MAHKAMAH:

No with due respect you are actually not answering the question.

PEGUAM DEFENDAN-DEFENDAN:

Sorry.

MAHKAMAH:

Court is not saying that the reader will not know that this came about because of the interview. But the reader may not know really what was the entire interview because you have only the summary I mean with respect, bukan?

PEGUAM DEFENDAN-DEFENDAN:

Yes.

MAHKAMAH:

In that respect I meant isn't it?

PEGUAM DEFENDAN-DEFENDAN:

Yes. My Lord I think Your Lordship is fair to raise that issue but I think that would be the case in most things because I think the readers of newspaper wouldn't know the facts behind every story that they read.

MAHKAMAH:

Right.

PEGUAM DEFENDAN-DEFENDAN:

> It would be impossible. Some readers may be aware some may not be aware but no one would be aware of everything when they read a newspaper. So one would have to look at the general impression and I think the general impression here amongst a lot of people to whom these matters may have accounted may have watch the BBC interview. I think the BBC interview was an interview which was very important because it was a very significant interview which the Plaintiff made after his acquittal and it was, the interview following his acquittal for his second sodomy trial. So it's an interview which a lot of people in Malaysia would have wanted to know what his response was. And I think in that context it would have been widely appreciated by the public.

[50] 'Fair comment' cannot justify a defamatory statement which is untrue in fact. 'A comment cannot be fair which is built upon facts which are not truly stated'. (Herschell LC in *Davis v Shepstone* (1886) 11 AC 187 at p 190). In order to give room for the plea of 'fair comment', the facts must be truly stated. If the facts upon which the comment or a statement of fact purported to have been made do not exist, the foundation of the plea fails. Comment must not convey imputations of an evil fact except so far as the facts truly stated warrant the imputations. (Lord Fletcher Moulton LJ in *Hunt v The Star Newspaper Co Ltd* [1908] 2 KB 309 at p 319). A publisher of a defamatory statement can only be protected if he shows that he had taken all reasonable precautions and then had a reasonable and well grounded belief in the truth of the statement. The plea of 'good faith' implies the making of a genuine effort to reach the truth, and a mere belief in the truth, without there being a reasonable grounds for such a plea, is not synonymous with good faith as unnessary aspersion is indicative of want of good faith (*Arnold v King Emporer* AIR 1914 AC 644). On the factual matrix of the present case, the defendants have failed to establish the defence of 'fair comment' as required by law and the defence of 'fair comment' is not open to the defendants and cannot be sustained (*Joynt v Cycle Trade Publishing Co* [1904] 2 KB 292).

[51] As for the defence of 'qualified privilege', while the defendants may have a duty as testified by DW3 to publish the articles, the plaintiff had succeeded in showing to this court that the defendants were motivated by malice where articles were published soon after what was said by DW1 and which was approved by DW3. DW3 had also admitted that the articles were published without verifying the truth of the facts from the plaintiff. Rightfully, the least, DW4 should have shown a copy of the plaintiff's statement given to the BBC to DW1 and having had referred the plaintiff's statement to DW1, DW4 should have then proceeded to pose the question based on the actual words of the plaintiff. Alternatively, DW3 should have read the plaintiff's statement given to BBC during the meeting with the editors and sub-editors to verify

whether DW1's statement reflects correctly or commensurate with what was actually said by the plaintiff to BBC but there was no evidence that this was carried out by DW3 and the articles are manifestly inappropriately balanced and an unnecessarily onerous infringement of an individual's reputation, in this case, the plaintiff. In other words, DW3 should have checked this fact by at least reading the plaintiff's statement together with DW1's statement or answer given to DW4's question before approving the articles or the publication. In fact, there was no reasonable explanation from DW3 why the defendants did not seek verification directly from the plaintiff before the articles were published except for DW4's evidence and the submissions for learned counsel, Dato' Firoz Hussein for the defendants that:

Re-examination of DW4

PEGUAM DEFENDAN-DEFENDAN:

Anda telah ditanya sama ada anda meminta respons daripada Datuk Seri Anwar Ibrahim sebelum menyiarkan berita tersebut Jawapan anda adalah tidak. Apakah sebabnya anda tidak mendapat komen ataupun respons daripada Datuk Seri Anwar Ibrahim? Sila jelaskan.

DW4:

Yang Arif, untuk makluman Utusan Malaysia merupakan satu akhbar yang diharamkan oleh PKR, dan kita tidak dibenarkan menghadiri sidang akhbar mereka sekalipun. Malahan ibu pejabat PKR Damansara mereka meletakkan papan tanda tidak membenarkan Utusan masuk walaupun sidang akhbar kepada semua wartawan. Jadi sememangnya hubungan kita dengan pemimpin PKR dan pemimpin PKR pun sememangnya tidak pernah melayan Utusan. Jadi kita berfikiran bahawa tidak perlu mendapat komen kerana kita tahu jawapan yang akan diberi. Tidak akan dapat respon.

Submissions of Dato' Firoz Hussein during clarification by the court on 27 December 2012.

MAHKAMAH:

What was justifiable urgency to report this articles?

PEGUAM DEFENDAN-DEFENDAN:

My Lord, with the greatest respect, if Your Lordship recalls, news has a very very short life span because from what Datuk Dr Hassan Ali's interview was broadcast on all the television networks, it was broadcast and therefore one couldn't wait for days on end, it had to come out on the next day because otherwise the news would become stale, My Lord.

MAHKAMAH:

That's what you are saying isnt it?

PEGUAM DEFENDAN-DEFENDAN:

> Yes that is the position that we have taken because if newspapers had to go through the full process of ascertaining the truth in great detail, they wouldn't be able to report the news the very next day especially news which had already come out on radio, television and all the other forms of media. So that's really why it was urgent to bring this news to the public as soon as possible.

[52] The statement from the Bar that the articles ought to be published on urgent basis and without verification, otherwise the news report would be stale seems to be a contradiction of the explaination given by DW4 and is unacceptable under the cicumstances. In other words, are the defendants not saying arguably that they were not sure of the truthfulness of DW1's statement to DW4 and would have sought verification from the plaintiff before it was published but for the alleged urgency to publish the articles or the alleged statement of the articles. Surely, the urgency of the articles to be published cannot outweigh the requirement for the truth of the articles and the reputation of an individual, in particular, when DW4 had raised his doubt and concern during the meeting with DW3 but DW3 was inconsiderate and paid no attention to the same. Based on the chronology of events which can be deduced from the totality of the evidence, inter alia, and in particular, DW3's evidence where he had discussed the publication of the articles during the meeting with all the editors and sub-editors and the conduct of DW3 in the circumstances surrounding the publication, there was lack of responsibility shown when the articles were published without verification from the plaintiff or the plaintiff's statement to BBC. It is especially so when nowhere in the plaintiff's statement to the BBC is there any indication admittedly, be it expressly or impliedly that there was any basis to infer from the entire plaintiff's statement that the issue of legalising gay, lesbian, homosexual and transgender activities *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* was ever mentioned at any point of time in the plaintiff's statement to BBC. Therefore, it is the respectful view of this court that there was no basis for the urgency nor was it in the public interest for the articles to be published so promptly without the verification from the plaintiff or without having perused the plaintiff's statement given to the BBC for verification during the meeting with the editors and sub-editors before the approval was given by DW3 especially, in a subject matter which is sensitive in its nature and considering the factual matrix of the present case. Had DW3 been careful and read the articles with care and attention as may fairly be expected of him as the group chief editor, and not disregarding the parts of the plaintiff's statement to the BBC, he may by his care avoided the risk of being liable for publication. However, he cannot escape liability merely by saying, providing lip service that he was careful and that his intention were good. Liability for libel does not depend on the intention of the defamer, but on the

fact of defamation (*Newstead v London Express Newspaper Ltd* [1940] 1 KB 377 (CA) at p 379, *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331 at p 354). A

[53] Reasonableness of the publication without verifying the truth from the plaintiff and upon considering, inter alia, the plaintiff's statement to the BBC as pleaded in the statement of claim, leaves this court with no other inference but that the publication was an irresponsible act with total disregard to an individual's reputation in the present case, the plaintiff and that was motivated by malice. Whether the publication of the articles was actuated with malice depends, in the circumstances of the case at the time of the publication. On the factual matrix in the present case, this court finds that it is difficult to resist to draw such an inference that the publication was motivated by malice. In fact, learned co-counsel Dato' Hafarizam for the defendants who took over cross-examination from Dato' Firoz Hussein later in the afternoon on 18 July 2012 had challenged the plaintiff during cross-examination to produce evidence that *Utusan Malaysia* is controlled by UMNO because it was the plaintiff's contention that the publication was influenced or had the support of his political opponents from UMNO. The plaintiff accepted the challenge and on the next continued hearing on 13 August 2012, he produced evidence to show that there were shareholders in the first defendant's company who were representatives of UMNO and the same was admitted by DW3. This evidence was produced by the plaintiff to show that the articles which were published by the defendants was motivated by malice so as to cause effect on the outcome of the expected coming general election. During cross-examination, DW3 said and is reproduced: B C D E F

PEGUAM PLAINTIF:

Anda bersetuju bahawa Utusan, suratkhabar Utusan Malaysia dan Utusan Melayu Malaysia Berhad ini di, pemilik utamanya adalah parti politik yang dikenali sebagai UMNO? G

DW3:

Saya setuju.

PEGUAM PLAINTIF:

Setuju? Anda setuju bahawa wakil Presiden parti UMNO mempunyai tempat di dalam Board of Directors Utusan Malaysia? H

DW3:

Wakil parti, atau Presiden?

PEGUAM PLAINTIF:

Wakil Presiden UMNO. I

DW3:

Secara umumnya saya setuju tapi saya tidak melihatnya sebagai wakil Perdana Menteri. Saya tidak melihatnya sebagai wakil Perdana Menteri.

PEGUAM PLAINTIF:

Dan siapakah individu ini yang dirujuk tadi?

DW3:

Apa yang dimaksudkan oleh tuan peguam?

PEGUAM PLAINTIF:

Apabila anda menyatakan bahawa anda tidak melihatnya sebagai wakil Perdana Menteri, siapakah individu yang dirujuk itu?

DW3:

Saya, mungkin tuan peguam lebih boleh memberikan saya apa rujukan sebenar tu?

PEGUAM PLAINTIF:

Adakah saksi tahu atau tidak siapa wakil Presiden UMNO itu yang duduk di dalam Board of Directors Utusan?

DW3:

Saya tahu. Saya tahu tapi atas, pada saya bukanlah atas kapasiti Perdana Menteri. Saya tidak melihatnya sebagai atas kapasiti Perdana Menteri.

PEGUAM PLAINTIF:

Atas kapasiti apa yang dia duduk?

DW3:

Saya melihat dia atas kapasiti mungkin parti lah, saya melihat. Parti.

PEGUAM PLAINTIF:

Parti apa?

DW3:

Maksud saya parti, wakil media di pejabat, lebih kepada parti lah. Parti UMNO itu sendiri.

PEGUAM PLAINTIF:

Parti UMNO?

DW3:

Ya, saya.

PEGUAM PLAINTIF:

Ok. Siapakah individu yang dirujuk oleh anda?

DW3:

Saya tak pasti yang mana, mungkin tuan peguam boleh sebutkan saya. Sebab ada beberapa nama dalam ahli Lembaga Pengarah.

PEGUAM PLAINTIF:

Ok. Siapakah individu yang dirujuk oleh anda?

DW3:

Saya tak pasti yang mana, mungkin tuan peguam boleh sebutkan saya. Sebab ada beberapa nama dalam ahli Lembaga Pengarah.

MAHKAMAH:

Takpa, show him

DW3:

Kalau dapat tuan peguam sebut saya.

PEGUAM PLAINTIF:

Anda tak tahu?

DW3:

Tak, saya perlu disebut nama untuk saya beri pengesahan.

PEGUAM PLAINTIF:

Anda enggan jawab soalan saya?

DW3:

Bukan saya enggan jawab. Saya nak. Sebab apa, Kita ada beberapa ahli Lembaga Pengarah.

PEGUAM PLAINTIF:

Sila rujuk kepada mukasurat Bundle B2. Mukasurat 164.

DW3:

1-6-4.

PEGUAM PLAINTIF:

Adakah anda dapat melihat di bawah column 'names' ada lapan nama yang dinyatakan di sana, direct and indirect interest of Directors?

DW3:

Ok.

PEGUAM PLAINTIF:

Mereka ini adalah pengarah Utusan Malaysia?

DW3:

Ok.

PEGUAM PLAINTIF:

Setuju?

DW3:

Ya.

PEGUAM PLAINTIF:

Dan di antara nama ini, yang manakah yang menjadi wakil parti UMNO?

DW3:

Saya lebih melihat yang wakil, lebih melihat kepada Tan Sri Haji Hussin Ahmad.

PEGUAM PLAINTIF:

Tan Sri Haji Hussin Ahmad.

PEGUAM PLAINTIF:

Anda pasti mengenai ini?

DW3:

Ya, dia salah seorang daripada wakil. Saya melihat dia sebagai salah seorang daripada wakil UMNO.

PEGUAM PLAINTIF:

Bagaimana pula nama yang di bawah sekali? Datuk Tengku Sarifuddin Tengku Ahmad? Bukankah dia juga adalah wakil daripada UMNO khususnya Presiden UMNO?

DW3:

Saya boleh lihat begitu.

PEGUAM PLAINTIF:

Boleh lihat begitu?

DW3:

Ya.

PEGUAM PLAINTIF:

Juga Datuk Tengku Sarifuddin ini?

DW3:

Boleh dibaca begitu.

PEGUAM PLAINTIF:

Selain daripada itu, nama-nama lain ini ada sesiapa lagi?

DW3:

Saya rasa tidak ada.

PEGUAM PLAINTIF:

Adakah arahan diberi oleh wakil parti UMNO di dalam Board of Directors kepada Editorial Board Utusan Malaysia?

DW3:

Tidak ada.

PEGUAM PLAINTIF:

Keterangan anda adalah bahawa wakil parti UMNO ini tidak bercampur tangan di dalam hal editorial?

DW3:

Tidak campur tangan sama sekali.

PEGUAM PLAINTIF:

Saya cadangkan kepada anda bahawa tugas wakil parti tersebut adalah untuk memastikan bahawa suratkhabar Utusan Malaysia itu menurut ataupun menyiarkan berita yang memihak kepada parti tersebut dan menentang parti lawan.

DW3:

Saya lebih anggap sebagai akhbar utusan membawa aspirasi pihak berkenaan. Membawa aspirasi pihak berkenaan.

PEGUAM PLAINTIF:

Cadangan saya adalah bahawa wakil parti tersebut di sana adalah untuk tujuan memastikan bahawa berita yang disiarkan adalah memihak kepada parti UMNO, setuju atau tidak setuju?

DW3:

Saya tidak setuju.

PEGUAM PLAINTIF:

Oleh demikian, mengapakah pihak-pihak ini duduk di dalam Board of Directors UMNO jika tidak ada apa-apa tugas dalam Editorial Board?

DW3:

Saya rasa itu lebih kepada mewakili parti tetapi dalam soal operasi harian tidak ada sebarang campur tangan daripada mana-mana pihak luar.

PEGUAM PLAINTIF:

So, boleh saya cadangkan kepada anda bahawa dalam Utusan Malaysia tidak memberi coverage yang seimbang mengenai isu-isu melibatkan parti pembangkang dan parti yang memerintah termasuk parti UMNO? Tidak seimbang.

DW3:

Saya setuju.

PEGUAM PLAINTIF:

Setuju?

DW3:

Ya.

MAHKAMAH:

Yes?

PEGUAM PLAINTIF:

Iaitu setuju bahawa memihak kepada parti UMNO dan parti pemerintah

DW3:

Yang Arif, saya lebih suka menggunakan istilah 'Membawa aspirasi parti pemerintah'.

MAHKAMAH:

Yes, use for Submissions, please.

PEGUAM PLAINTIF:

Very well, My Lord. Setuju bahawa adalah tanggungjawab sivik sesuatu surat khabar nasional untuk memberi coverage yang seimbang? Setuju ye?

MAHKAMAH:

Setuju?

[54] DW4's evidence is reproduced:

PEGUAM PLAINTIF:

Melihat kepada pemeriksaan utama anda, anda di sini tidak menyatakan bahawa artikel itu benar. Adakah dalam pemeriksaan utama anda, anda menyatakan bahawa kandungan artikel tersebut mengenai Plaintif itu benar?

DW4:

Ya Yang Arif. Tak pasti

PEGUAM PLAINTIF:

Adakah keterangan anda pada pagi ini di mahkamah bahawa anda tidak pasti jika kandungan artikel tersebut mengenai Plaintif benar atau tidak?

DW4:

Yang Arif, kita hanya melaporkan apa yang …

PEGUAM PLAINTIF:

Encik Zul jawab soalan saya. Adakah keterangan anda pada pagi ini bahawa anda tidak pasti bahawa kandungan artikel itu mengenai Plaintif benar atau tidak? You are not sure?

DW4:

Saya tak pasti.

PEGUAM PLAINTIF:

Maknanya anda menyatakan di sini mungkin kandungan itu benar, mungkin tidak benar.

DW4:

Tak pasti Yang Arif.

PEGUAM PLAINTIF:

Tak soalan saya, maknanya adakah anda bersetuju keterangan anda artikel itu mungkin benar, atau mungkin tidak benar?

DW4:

Kedua-dua.

PEGUAM PLAINTIF:

Mungkin benar, mungkin tidak benar?

DW4:

Ya.

PEGUAM PLAINTIF:

Itu jawapan anda?

MAHKAMAH:

Leave it for submissions.

PEGUAM PLAINTIF:

Very well.

Based on DW4's evidence, surely if DW4 himself is not sure and had repeatedly said he was not sure if the articles were true, DW3 cannot then assume the articles to be true or believe it to be true and be permitted to contradict DW4's evidence where DW3 said 'yakin benar' without any factual basis. There is no evidence to support what is the basis for DW3's believe as to the truth of the articles and it has not been explained by DW3 except for his bare evidence that he believes the articles to be true which flies in the face of the plaintiff's statement to the BBC and DW4's evidence in court of his concern and reservation of the articles which was approved by DW3 to be published where DW3 paid no heed and was inconsiderate to the rights and reputation of others.

[55] Be that as it may, it is also interesting to note the answers given by DW3, to question No 10 under examination-in-chief in his witness statement:

(a) first, he had said that as the National newspaper, the first defendant is responsible to report all issues in respect of the opposition leader;

(b) issue such as this is important to the public;

(c) the news which was published contains sufficient information to provide the public to chose or to reject their leaders in the coming general election; and

(d) this is one principle based on democracy and freedom of speech which is important

DW3's answer to question 10 under examination-in-chief in his witnesss statement, is reproduced:

> **Question:**
> Pada pendapat Datuk, apakah sebab Utusan Melayu menerbitkan Artikel tersebut?
> **Answer:**
> Utusan Melayu mempunyai tanggungjawab sebagai akhbar nasional untuk melaporkan segala isu mengenai ketua pembangkang. Isu seperti ini adalah penting kepada rakyat. Berita yang diterbitkan mengandungi maklumat yang mencukupi untuk memberi pilihan kepada rakyat untuk memilih ataupun menolak pemimpin mereka di Pilihanraya Umum kelak. Ini adalah suatu prinsip asas demokrasi dan kebebasan bersuara adalah penting.

[56] Further, DW3's answer to question No 11 under examination-in-chief is reproduced:

> **Question:**
> Pada pendapat Datuk, apa yang diterbitkan oleh Utusan Melayu berkenaan dengan Artikel tersebut, merupakan perkara yang benar (justified) berkenaan dengan Artikel tersebut?
> **Answer:**
> Utusan Melayu hanya menerbitkan apa yang telah diucapkan oleh Dr. Hasssan Ali.

DW3 did not in fact answer question No 11 posed by his own counsel in the witness statement which is under examination-in-chief, but instead, he avoided to answer the question whether the article which was published was justified. In other words, a reasonable inference that can be drawn based on his answer to a very simple question No 11 (which in fact had contained the answer), is that, he was not sure and was not concern of practicing responsible journalism, whether what was said by DW1 was in fact true. It is important to

state that this is a pre-prepared written question and answer in the witness statement under examination-in-chief and yet DW3 did not answer or was bothered to answer simple question which was expressly related to one of the statutory defences pleaded, being justification but he chose to avoid answering the question despite the fact that the articles had contained imputation and had implicated the plaintiff in the eyes of the public.

DW3's answer to question 16 under examination-in-chief, is reproduced:

> **Question:**
>
> Kami merujuk kepada perenggan 12.2 Pernyataan Tuntutan (mukasurat 15, ikatan pliding), apakah komen Datuk yang mengatakan bahawa Utusan telah dengan sengaja mencetak Artikel tersebut untuk menarik perhatian pembaca?
>
> **Perenggan 12.2 Pernyataan Tuntutan adalah:**
>
> 'Artikel tersebut telah dengan sengaja dicetak dengan ketara pada mukasurat hadapan akhbar berkenaan untuk menarik perhatian pembaca dan mengakitbatkan plaintif mengalami kerosakkan yang teruk dan terpaksa menaggung malu.'
>
> **Answer:**
>
> Saya ingin menyatakan disini bahawa artikel tersebut dicetak dan diterbitkan dengan ikhlas dan jujur tanpa sebarang niat jahat. Justeru itu, kami *tidak mencetak Artikel tersebut semata-mata untuk menarik perhatian pembaca*. Sekali lagi saya tegaskan bahawa kami mempunyai tanggung jawab sebagai akhbar untuk melaporkan. Ini adalah perkara asas yang ditegakkan dalam prinsip demokrasi. Hak bersuara ataupun kebebasan bersuara adalah termaktub dalam perkara 10 Perlembagaan Persekutuan. (Emphasis added.)

[57] DW3's answer to question No 16 under examination-in-chief cannot be reconciled with his answer to question No 10 under examination-in-chief. On one hand, DW3 has stated that the news which was published contained sufficient information to provide the option to the public to chose or to reject their leader in the coming general election. On the other hand, DW3's answer to question No 16 states that the defendants did not publish the article to attract or draw the attention of the readers. Is this not a material contradiction? Obviously, it is. DW3 does not even seem to know his previous answer to question No 10 which states that the article was published as it is of interest to the public and to provide the public with such information. Whereas his answer to question No 16 states that the article was not published to attract or the attention of the readers.

[58] This court finds that if malice is established, it would destroy the defence of 'fair comment or 'qualified privilege' upon considering the totality of the evidence. The test of malice is, whether the means used and the disregard of one's neighbour 'are such no honest and fair minded man ought to resort to'

(Lord Herschell in *Allen v Flood* [1898] AC 1 at p 126). 'The proper question has to believe is not whether the defendant reasonably, but whether he honestly, that is, genuinely, believed what he published of the plaintiff (*Collins v Cooper* (1902) 19 TLR 118). But there must be good faith', (per Lord Herschell in *Allen v Flood* (1898) AC 1 at p 126). 'Honesty, that is, a genuine belief in the truth of the defamatory statement, is essential to protection, even when the occasion is privileged, and is made use of for the permitted purpose' (*Toogood v Spyring* (1834) 1 Cr M&R 181, *London Association for Protection of Trade and another v Greenlands Ltd* [1916] 2 AC 15 at p 22.) As stated above, there was in fact ample opportunity for the defendants to have considered the implication, ie the benefit of publishing the articles without verification against the higher risk of being sued by the plaintiff for defamation, in particular, upon considering DW4's evidence as to what had transpired during the meeting with DW3 together with the editors and sub-editors before the articles were approved for publication by DW3. DW4 had testified that he had raised his concern and reservation on the articles at the meeting of the editors and sub-editors headed by DW3 before DW3 had approved the articles to be published but however, it would appear that DW3 paid no heed to the concern and the predicament of DW4. There are two aspects to consider in a defamation case. One, lies the right to freedom of speech and expression and other is the right of the individual to have his reputation intact. It may all depend how far the liberty of free speech and expression extends when it becomes necessary for the law to step into safeguard the right of the individual to preserve his honour and reputation. On the factual matrix of the present case, it would be more consistent with justice and legal principles to find that there was malice on the defendants' part to publish the articles which contains uncharitable imputations with total disregard to the truth and which contains disgraceful or calumnious assertions against the plaintiff. The terms or language of the libel is beyond and manifestly disproportionate to the facts and the plaintiff's statement to BBC under the circumstances.

'Everybody knows that sometimes half a truth is no better than a downright falsehood' (Lord Macnaghten in *Gluckstein v Barnes* [1900] AC 240 at pp 250–251)

(Lord Blackburns' expression in *Smith v Chadwick* (1884) 9 App Cas 187 at p 201 'lie like truth')

[59] As stated above, this is clearly reflected in DW4's evidence when he repeatedly said under cross-examination by learned counsel Mr Surendran for the plaintiff that he was not sure whether the articles were true, his evidence is reproduced:

PEGUAM PLAINTIF:

Encik Zulkiflee, sila rujuk kepada Penyata Saksi iaitu 08, kepada soalan nombor 3 dan jawapannya. Apabila ditanya soalannya, apakah proses yang diambil sebelum sesuatu berita ataupun artikel itu diterbitkan, Encik Zulkiflee menjawab, bermula dengan wartawan menulis berita berkenaan, ia kemudiannya akan disunting oleh penolong pengarang berita dan pengarang berita termasuk saya. Bagaimanapun sama ada sesuatu berita itu akan disiarkan atau tidak ianya bergantung kepada mesyuarat harian editorial, yang kebiasaannya diadakan di sebelah petang. Antara perkara utama yang paling diambil kira ialah kesahihan dan fakta sesuatu berita itu serta kredibiliti sumber berita itu. Soalan saya, Encik Zulkiflee bersetuju bahawa makna kesahihan itu ialah kebenaran, setuju?

DW4:

Ya, setuju.

PEGUAM PLAINTIF:

Setuju bahawa berita yang disiarkan oleh akhbar Utusan Malaysia ini perlulah benar?

DW4:

Setuju Yang Arif.

PEGUAM PLAINTIF:

Setuju bahawa sebagai akhbar nasional, anda tidak boleh mengulangi sesuatu yang tidak benar?

DW4:

Setuju.

PEGUAM PLAINTIF:

Jika seseorang pihak ketiga mengeluarkan kenyataan tidak benar, sebagai akhbar anda tidak boleh mengulanginya, setuju?

DW4:

Setuju Yang Arif

PEGUAM PLAINTIF:

Anda tahu bahawa Plaintif di sini membawa kes ini kerana tidak berpuas hati dengan suatu berita yang dikeluarkan oleh akhbar Utusan Malaysia, tahu?

DW4:

Saya tahu.

PEGUAM PLAINTIF:

Dan sila rujuk kepada Ikatan B, Bundle B. Ikatan yang nipis bertanda B. Sila rujuk kepada muka surat 5 Bundle B. Ia merupakan artikel yang dikeluarkan oleh akhbar Utusan Malaysia pada 17.01.2012, ada ya?

DW4:

Ada.

PEGUAM PLAINTIF:

Cuba lihat kepada kolum kedua, jawapan di bawah. Soalan apakah pandangan Dato' berhubung kenyataan Anwar yang mempertikaikan undang-undang berkaitan kegiatan homoseksual di negera ini, soalan. Jawapannya saya baca, Hassan, 'inilah salah satu sebab saya tidak boleh bersekongkol dengan Anwar Ibrahim. Inilah sebabnya rakyat Malaysia mesti menolak perjuangan Anwar Ibrahim. Kalau kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia, saya rasa masyarakat akan bergolak dan berpecah.' Kita berhenti di sana. Soalan saya, adakah anda memberi kebenaran ataupun approve berita ini untuk disiarkan di dalam akhbar Utusan Malaysia?

DW4:

Yang Arif, yang memberi kebenaran bukan saya. Tidak, bukan saya. Encik Zulkifiee, siapa yang memberi kebenaran, kelulusan? Kelulusan Ketua Pengarang.

PEGUAM PLAINTIF:

Dan siapakah Ketua Pengarang?

DW4:

Dato' Abdul Aziz Ishak.

PEGUAM PLAINTIF:

Anda langsung tidak terlibat dalam meluluskan berita yang tersebut untuk disiarkan?

DW4:

Saya terlibat Yang Arif, dalam mesyuarat petang.

PEGUAM PLAINTIF:

Berapa mesyuarat yang anda terlibat dalam meluluskan berita tersebut?

DW4:

Kita ada satu sahaja mesyuarat di sebelah petang.

PEGUAM PLAINTIF:

Dan dalam mesyuarat itu, adakah artikel ataupun berita ini dibincangkan?

DW4:

Ya Yang Arif.

PEGUAM PLAINTIF:

Siapa lagi ada dalam perjumpaan itu?

DW4:

Yang Arif mesyuarat itu melibatkan semua ketua-ketua meja, editor-editor semua meja, semua bidang. Kita ada bidang masing-masing, mahkamah dan sebagainya. Semua ketua-ketua meja itu akan masuk.

MAHKAMAH:

Semua ketua-ketua meja dalam Utusan Malaysia?

DW4:

Ya.

PEGUAM PLAINTIF:

Dan dalam perjumpaan tersebut adakah Encik Zulkifli memberi pandangan mengenai berita tersebut ini?

DW4:

Ya Yang Arif, saya ada bagi pandangan.

PEGUAM PLAINTIF:

Dan apakah pandangan yang diberi?

DW4:

Yang Arif dalam mesyuarat itu saya pertegaskan bahawa beberapa kenyataan oleh Datuk Hassan mempunyai implikasi, tapi disebabkan berita ini berbentuk transkrip penuh tanpa sebarang penyuntingan maka mesyuarat terutamanya Ketua Pengarang bersetuju untuk ia disiarkan.

PEGUAM PLAINTIF:

Encik Zulkiflee, apakah implikasi yang seperti dinyatakan?

DW4:

Implikasi ialah berhubung dengan tindakan undang-undang.

PEGUAM PLAINTIF:

Apakah isu yang timbul mengenai tindakan undang-undang?

DW4:

Yang Arif, isu yang timbul ialah kemungkinan Datuk Seri Anwar akan menafikan dan akan menganggap bahawa kami melakukan fitnah.

PEGUAM PLAINTIF:

Adakah pandangan anda pada masa itu bahawa berita itu adalah suatu berita fitnah terhadap Datuk Seri Anwar Ibrahim ataupun Plaintif?

DW4:

Tidak Yang Arif.

PEGUAM PLAINTIF:

Jikalau tidak, mengapakah anda bimbang mengenai kemungkinan disaman?

DW4:

Yang Arif, kita menghadapi banyak saman yang kita anggap berunsur politik, begitu juga dalam kes ini.

PEGUAM PLAINTIF:

Tetapi jika kandungan berita itu benar, anda tidak perlu bimbang mengenai tindakan undang-undang di bawah bidang fitnah, benar?

DW4:

Saya tak pasti Yang Arif.

PEGUAM PLAINTIF:

Anda bimbang mengenai kemungkinan tindakan undang-undang, fitnah oleh Plaintif, kerana anda tahu bahawa tidak ada asas untuk berita yang ingin disiarkan itu.

DW4:

Saya tidak bersetuju Yang Arif.

PEGUAM PLAINTIF:

Pada hari yang sama, pada perjumpaan yang sama itu, adakah timbul isu mengenai implikasi undang-undang mengenai mana-mana artikel lain?

DW4:

Tidak ada.

PEGUAM PLAINTIF:

Maknanya, kemungkinan tindakan undang-undang ini timbul hanya berkaitan artikel mengenai Plaintif di sini.

MAHKAMAH:

Pada mesyuarat itu.

DW4:

Pada mesyuarat itu, ya Yang Arif.

PEGUAM PLAINTIF:

Ia hanya mengenai Plaintif?

DW4:

Ya.

PEGUAM PLAINTIF:

Dan saya cadangkan isu mengenai tindakan undang-undang hanya timbul mengenai Plaintif kerana kesemua yang hadir dalam perjumpaan itu tahu bahawa tidak ada asas untuk artikel tersebut. Saya cadangkan, timbul isu kemungkinan tindakan diambil oleh Datuk Seri Anwar kerana semua yang ada pada perjumpaan itu tahu bahawa tidak ada asas untuk artikel tersebut.

DW4:

Tidak bersetuju.

MAHKAMAH:

He can't read the mind of others. Teruskan.

PEGUAM PLAINTIF:

Melihat kepada pemeriksaan utama Encik Zulkiflee, anda tidak di mahkamah pada hari ini menyatakan bahawa kandungan artikel itu benar? You are not saying it's true?

DW4:

Boleh ulang soalan?

PEGUAM PLAINTIF:

Melihat kepada pemeriksaan utama anda, anda di sini tidak menyatakan bahawa artikel itu benar. Adakah dalam pemeriksaan utama anda, anda menyatakan bahawa kandungan artikel tersebut mengenai Plaintif itu benar?

DW4:

Ya Yang Arif. Tak pasti.

PEGUAM PLAINTIF:

Adakah keterangan anda pada pagi ini di mahkamah bahawa anda tidak pasti jika kandungan artikel tersebut mengenai Plaintif benar atau tidak?

DW4:

Yang Arif, kita hanya melaporkan apa yang …

PEGUAM PLAINTIF:

Encik Zul jawab soalan saya. Adakah keterangan anda pada pagi ini bahawa anda tidak pasti bahawa kandungan artikel itu mengenai Plaintif benar atau tidak? You are not sure?

DW4:

Saya tak pasti.

PEGUAM PLAINTIF:

Maknanya anda menyatakan di sini mungkin kandungan itu benar, mungkin tidak benar.

DW4:

Tak pasti Yang Arif.

PEGUAM PLAINTIF:

Tak soalan saya, maknanya adakah anda bersetuju keterangan anda artikel itu mungkin benar, atau mungkin tidak benar?

DW4:

Kedua-dua.

PEGUAM PLAINTIF:

Mungkin benar, mungkin tidak benar?

DW4:

Ya.

PEGUAM PLAINTIF:

Itu jawapan anda?

MAHKAMAH:

Leave it for submissions.

PEGUAM PLAINTIF:

Very well.

MAHKAMAH:

Unless you want to pursue on it.

PEGUAM PLAINTIF:

No not at all My Lord, I think it's quite clear. I'm obliged. Jadi, adakah anda meminta Plaintif Datuk Seri Anwar Ibrahim untuk responsnya kepada artikel ini sebelum menyiarkannya?

DW4:

Tidak Yang Arif.

PEGUAM PLAINTIF:

Setuju anda sepatutnya meminta komen daripada Plaintif sebelum menyiarkannya?

DW4:

Tidak setuju Yang Arif.

PEGUAM PLAINTIF:

Adakah anda bersetuju bahawa artikel seperti ini disiarkan mengenai Plaintif dengan tujuan untuk merosakkan reputasi politiknya, reputasinya di dalam arena politik.

DW4:

Tidak Yang Arif.

PEGUAM PLAINTIF:

My Lord I think that's all I have.

Pemeriksaan Semula (Re-examination)

PEGUAM DEFENDAN:

Rakan bijaksana saya telah menanyakan soalan sama ada artikel tersebut disiarkan untuk merosakkan reputasi politik Plaintiff. Dan jawapan anda ialah tidak. Sila jelaskan kepada mahkamah yang mulia ini apakah tujuan menulis artikel tersebut?

DW4:

Yang Arif, pada masa itu isu yang paling hangat ataupun news of the day adalah sidang akhbar oleh Datuk Dr Hassan Ali, dan kita membuat liputan pada hari berkenaan berdasarkan kepada pertimbangan itulah isu yang menjadi tumpuan pada hari berkenaan. Sama ada ketika itu isu politik ataupun tidak, tapi apa isu yang menjadi keutamaan termasuklah soal Datuk Dr Hassan Ali, yang ketika itu seluruh negara memberi tumpuan terhadap pemecatan dia daripada PAS. Dan ini merupakan sidang akhbar pertama oleh Dr Hassan Ali untuk menjawab segala tuduhan. Dan kenyataan Datuk Dr Hassan Ali begini, Anwar hanyalah sebahagian daripada isu pada masa itu, yang ditanya secara kebetulan ketika sidang akhbar.

PEGUAM DEFENDAN-DEFENDAN:

Encik Zulkiflee, anda telah ditanya oleh rakan bijaksana saya, jika artikel tersebut tidak bersifat fitnah, anda tidak perlu bimbang, itu soalan dia dan anda telah menjawab tidak semestinya. Bolehkah Encik Zulkiflee menjelaskan kenapa berjawab tidak semestinya, apakah penjelasan?

DW4:

Boleh ulang soalan?

PEGUAM DEFENDAN-DEFENDAN:

Di dalam mesyuarat yang diadakan pada sebelah petang, anda telah ditanya oleh rakan bijaksana saya, di mesyuarat itu jika berita tersebut tidak bersifat fitnah, kenapa anda bimbang, dan Encik Zulkiflee telah menjawab tidak semestinya. Ingat tak jawapan Encik Zulkiflee berkata tidak semestinya. Saya ingin tahu apakah sebab Encik Zulkiflee berkata tidak semestinya, apakah penjelasan lanjut kenapa tidak semestinya tidak perlu bimbang tentang perkara ini?

MAHKAMAH:

Was there a word tidak semestinya?

PEGUAM PLAINTIF:

I actually don't have that, unless I'm mistaken.

PEGUAM DEFENDAN-DEFENDAN:

I heard him saying tidak semestinya. Adakah Encik Zulkiflee berkata tidak semestinya ke tidak? Itu saya dengar.

DW4:

Tidak.

PEGUAM DEFENDAN-DEFENDAN:

Ok never mind.

MAHKAMAH:

Can you play back for him?

PEGUAM DEFENDAN-DEFENDAN:

We will carry on. Encik Zulkiflee tadi tidak setuju bahawa tidak ada asas kepada berita tersebut. Sila jelaskan jawapan kenapa Encik Zulkiflee mengambil pandangan bahawa ada asas kepada artikel tersebut?

PEGUAM PLAINTIF:

He never said that. He never said ada asas My Lord. In fact he said tidak pasti either way. My learned friend is putting words that.

PEGUAM DEFENDAN-DEFENDAN:

I thought he said tidak setuju tiada asas.

PEGUAM PLAINTIF:

He said tidak pasti, I repeatedly asked that question. He is not sure whether it's true or not, until My Lord said better leave it for submissions.

PEGUAM DEFENDAN-DEFENDAN:

That was subsequently My Lord. Initially I think he was asked, he said tidak setuju tiada asas kepada berita tersebut. There was no basis. Then I put a note here, sila jelaskan apakah asas, what was the basis that he thought.

PEGUAM PLAINTIF:

Yes, I think earlier before that exchange I did put it to him and he did say tidak setuju. Yes, so I'm just asking him what his asas is.

MAHKAMAH:

Faham ya soalan?

DW4:

Boleh ulang?

PEGUAM DEFENDAN-DEFENDAN:

Anda telah ditanya oleh rakan bijaksana saya sama ada anda setuju bahawa tidak ada asas kepada berita tersebut. Anda kata tidak setuju. Sila jelaskan.

DW4:

Yang Arif, kenyataan yang dibuat oleh Dr Hassan Ali berdasarkan kepada kenyataan oleh Datuk Seri Anwar Ibrahim kepada BBC, dan kita perlu menyiarkan sepenuhnya apa yang dikatakan oleh Dr Hassan Ali dan tanpa kita melakukan sebarang penyuntingan. Itu kita punya pegangan ketika itu.

PEGUAM DEFENDAN-DEFENDAN:

Anda telah ditanya sama ada anda meminta respons daripada Datuk Seri Anwar Ibrahim sebelum menyiarkan berita tersebut. Jawapan anda adalah tidak. Apakah sebabnya anda tidak mendapat komen ataupun respons daripada Datuk Seri Anwar Ibrahim? Sila jelaskan.

DW4:

Yang Arif, untuk makluman Utusan Malaysia merupakan satu akhbar yang diharamkan oleh PKR, dan kita tidak dibenarkan menghadiri sidang akhbar mereka sekalipun. Malahan di ibu pejabat PKR Damansara mereka meletakkan papan tanda tidak membenarkan Utusan masuk walaupun sidang akhbar kepada semua wartawan. Jadi sememangnya hubungan kita dengan pemimpin PKR, dan pemimpin PKR pun sememangnya tidak pernah melayan Utusan. Jadi kita berfikiran bahawa tidak perlu mendapat komen kerana kita tahu jawapan yang akan diberi, tidak akan dapat respon.

PEGUAM DEFENDAN-DEFENDAN:

Rakan bijaksana saya telah menanyakan soalan sama ada kandungan artikel tersebut benar, dan jawapan anda adalah tak pasti. Bolehkah Encik Zulkiflee menjelaskan jawapan ini?

DW4:

Yang Arif, sepertimana saya katakan bahawa berita tersebut adalah kenyataan Datuk Dr Hassan Ali, dan Datuk Hassan Ali telah pasti. tahu sama ada pernyataan yang beliau buat itu adalah benar ataupun tidak, dan kita hanya menyiarkan laporan berkenaan tanpa melakukan penyuntingan.

PEGUAM DEFENDAN-DEFENDAN:

Tanpa melakukan penyuntingan, sila jelaskan apa maksud anda?

DW4:

Yang Arif, disebabkan berita ini berbentuk transkrip penuh. Dalam pemberitaan, apabila sesuatu akhbar ada pemberitaan transkrip penuh atau wawancara penuh, kita tidak akan melakukan sebarang pemindaan kepada ayat-ayat untuk memperbetulkan perkataan ataupun ayat-ayat, dan kita akan siar sepertimana yang dikatakan oleh sumber.

PEGUAM DEFENDAN-DEFENDAN:

Dan anda hadir di wawancara tersebut?

DW4:

Ya Yang Arif.

PEGUAM DEFENDAN-DEFENDAN:

No further question My Lord.

[60] Based on the evidence, DW3 must have known the articles were grossly misleading and this is supported by the plaintiff's statement to BBC and the DW4's concern of the articles to be published.

[61] On the other hand, even if DW4's explanation for not having verified with the plaintiff is accepted as a reasonable explanation, there is still no evidence before this court whether DW3 had with him at the material time the plaintiff's statement to BBC, when the two articles were approved for publication during the meeting with the editors and sub-editors, especially, when DW4 had expressed his concern as to whether the publication of the articles should proceed for publication and the consequences arising thereon if the articles are published. Further, since the statements from DW1 which is the subject matter of the articles published by the defendants was in response to a question posed by DW4 which itself was a misleading question, DW3 ought to have verified the articles before the same was approved for publication. The question by DW4 to DW1 is reproduced:

> Apa pandangan Datuk berhubung kenyataan Anwar yang *mempertikaikan undang-undang* berkaitan homoseksual di Negara ini. (Emphasis added.)

[62] It is important at this stage, to consider whether DW4 had shown the plaintiff's statement to BBC to DW1 eventhough DW1 may have had prior knowledge of the plaintiff's interview with the BBC. For the sake of convenience, it is important to reproduce once again the plaintiff's statement to BBC and the question and answer between DW4 and DW1 and consider the answer given by DW1 and subsequently published by the defendants which cannot be reconciled nor is it propotionate with the plaintiff's statement to BBC:

> **Plaintiff's statement to BBC on 12.1.2012:**
>
> We will have to review some of these archaic laws. We Muslims and non-Muslims in Malaysia generally believe and committed to support the sanctity of marriage between man and woman. But we should not be seen to be punitive and consider the archaic laws as relevant. We need to review them. We do not promote either homosexuality in a public sphere or domain. I don't think we even need to make apologies towards that. But I think to use this sort of legislation to be punitive, punish innocent people cannot be condoned or tolerated.
>
> **Question by DW4:**
>
> Apa pandangan Datuk berhubung kenyataan Anwar yang *mempertikaikan undang-undang* berkaitan homoseksual di Negara ini. (Emphasis added.)
>
> **Answer by DW1:**

> Inilah salah satu sebab saya tidak boleh bersekongkol dengan Anwar Ibrahim. Inilah sebabnya rakyat Malaysia mesti menolak perjuangan Anwar Ibrahim. Kalau kegiatan gay, lesbian homoseksual dan transgender, itu hendak dihalalkan di Malaysia, saya rasa masyarakat akan bergolak dan berpecah. Saya nampak kekacauan akan berlaku. Ini pandangan saya.

[63] It is also important to consider that DW1 had testified in court that the question posed by DW4 to him was impromptu and therefore, he himself did not verify. The question and answer during re-examination of DW1 is reproduced:

> **PEGUAM DEFENDAN-DEFENDAN:** (Re-examination)
> Bolehkan Datuk menjelaskan sebab Datuk tidak dapat penjelasan daripada Datuk Seri Anwar Ibrahim kepada BBC mengenai wawancara beliau seperti mana yang telah dipersoalkan oleh Yang Arif tadi?
> **DW1:**
> *Pertama saya mengatakan bahawa ini adalah proses conference yang impromptu dan kita tidak menduga Yang Arif soalan-soalan yang akan dikemukakan. Banyak soalan yang dikemukakan antaranya ialah soalan mengenai ini yang saya tidak menduga pun soalan ini akan timbul.* Maka dengan itu saya rasa tidak ada keperluan bagi saya untuk menghubungi mana-mana orang bukan sahaja Datuk Seri Ibrahim pun. Kalau misalnya dalam press conference kita nak menghubungi setiap orang saya tak tahulah siapa yang perlu saya hubungi lagi untuk menjawab soalan-soalan itu, terima kasih. (Emphasis added.)

In other words and based on the evidence given by DW1, this court is of the considered view that the defendants should not have published the two articles without a proper sense of 'responsible journalism' having been carried out regularly instead of trying desparately to justify the publication that it had merely published what was said by DW1, without even examining the plaintiff's statement to BBC with the articles before it was approved for publication. The articles as stated above, in its ordinary and natural meaning is capable of conveying an imputation to the effect that the plaintiff must have said that he wished or was inclined towards gay, lesbian, homosexual and transgender activities to be legalised *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* which is not true and damaging to the plaintiff's reputation. It is important at this stage to reiterate that the reply from DW1 to the question post by DW4 during the press conference held on 16 January 2012 was in relation to the sacking of DW1 as Commissioner of PAS Selangor by PAS and it was entirely another matter between DW1 and his previous political parry. Therefore, the defendants cannot just take shield by repeatedly emphasising that what the defendants had published was what was said by DW1 when it was DW4 who had initiated the

response by a misleading question and the answer by DW1 admittedly was impromptu without any evidence that DW1 had a copy of the plaintiff's statement to BBC and he himself did not verify, which in any event, does not even contain any material or to the effect that the plaintiff had ever disputed *(mempertikaikan)* the law on homosexuality but for his concern of innocent people being punished and the harshness of the punishment.

[64] In the circumstances and based on the totality of the evidence, the defence of 'qualified privilege' must also fail upon considering the DW3's conduct as the chief editor of *Utusan Malaysi*a in the circumstances surrounding the publications of the articles despite the reservation of DW4 of the publication of the articles (*Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142b). On the totality of the evidence, this court finds that this is a case where DW3 is caught in his own web and was desperately attempting to get out of it but without success when considering his evidence in reply to the cross-examination by Mr Surendran, learned counsel for the plaintiff. In other words, the defendants are unable to establish their defence of justification, fair comment, and qualified privilege.

[65] As for the defence of 'reportage', which has been pleaded (which is not one of the statutory defences under the Defamation Act 1957) to provide the public a timely information on matters of public interest, this court is of the considered view that there ought to be a balancing exercise by the defendants, one, the need to provide information to the public on matters of public interest which must be the truth as against the need to avoid damaging the reputation of an individual which cannot be compromised. In any event, DW3 had contradicted his evidence in his answer to question No 16 in contrast to his answer to question No 10. Futher, the fact that the articles reported was commented by a supposedly reputable politician should make no difference and is an irrelevant consideration in construing the articles in the context of a defamation suit and based on settled judicial principles and this line of arguments appears to be another desporate defence under the circumstances. Further still, it is contended on the defendants' behalf that there was an on going political dispute involving DW1 and PAS which was part of the Pakatan Rakyat and which is headed by the plaintiff. Once again, the defendants seem to be taking an inconsistent stand through their submissions. On one hand, it is submitted that the articles reported is a comment by a reputable politician, obviously referring to DW1. On the other hand, it is also contended on the defendants' behalf that there was an ongoing political dispute involving DW1 and PAS which according to the submissions on the defendants' behalf is part of Pakatan Rakyat and which is headed by the plaintiff.

[66] It is important to state at this stage and it cannot be disputed that the press conference which was called by DW1 on 16 January 2012 was

concerning his sacking by PAS as the Selangor Commissioner and obviously DW1 was an aggrieved person at that time. Therefore, DW1's immediate reaction and without verification to an impromptu question and by DW4 in unrelated press conference called by DW1 was that of an aggrieved person against PAS which according to the defendants is part of Pakatan Rakyat and is headed by the plaintiff and in the course of the press conference, DW1 had reacted and responded impromptu to the question when the question was put to him by DW4. Under the circumstances and based on the factual matrix, DW3 should have taken extra care and caution in ensuring whether what was said by DW1 was true in substance and effect in relation to the plaintiff's statement to BBC, in particular, when DW4 himself had expressed his concern and reservation against publishing the articles which would implicate the plaintiff and has in fact implicated the plaintiff. In addition, DW4 himself had testified in court that he is not sure that the statement by DW1 is true and that could have been the reason why DW4 had right from the beginning appeared not to be in favour of the articles being published. In any event, first, there is no evidence before this court that DW1 is a reputable politician as contended and secondly, there is no authority to support the contention of learned counsel for the defendants that the articles published by the newspapers, *Utusan Malaysia* which is based on the statement made by a supposedly reputable politician should be given a different or separate interpretation as to whether the article is capable of being defamatory of the plaintiff. On the factual matrix in the present case and even if DW1 is to be considered as a reputable politician as contended, it should not make any difference or influence this court in construing the articles and based on settled judicial principles and neither is the issue of DW1 supposedly being a reputable politician a relevant or a decisive consideration for this court to arrive at its decision in this defamation suit. Accordingly, the contention on the defendants' behalf that impliedly a different construction should be given to DW1's statement who supposedly is a reputable politician is misplaced and is a 'red herring'.

[67] Be that as it may, in so far as the evidence of DW2, this court is of the considered view that it is not relevant and is of no assistant to the court to construe and decide on the articles published and the defences raised by the defendants. As for the evidence of DW5, he had merely confirmed that DW1 had spoken on several issues relating to policies and mainly it was on his sacking from PAS and his struggle to uphold '*Islam, Melayu and Raja-Raja*' and is also of no assistance to the court on the construction of the articles or the defences.

[68] Since the press conference called by DW1 on 16 January 2012 for which DW4 had attended was in reference to the sacking of DW1 as Commissioner of PAS, Selangor by PAS, why was that subject matter not published on the front page of *Utusan Malaysia* but 'importance' seems to have been given to the statement made by DW1 in reference to the question by

DW4 concerning the plaintiff's statement to BBC which of course has been reported and published out of context to cast imputation on the plaintiff. In considering the defences of reportage even if it is a recognised defence, surely this court must take into consideration all the surrounding circumstances which led to the publication of the articles in *Utusan Malaysia*. Having taken into considering all the surrounding circumstances, DW3's purported believe that the imputation was true which in fact was not true right from the beginning and had turned out to be unfounded publication and not sufficient to support DW3's believes as to the truth (*Peters v Broad Lough* (1884) 4 TLR 469).

[69] Having taken into account the nature of words, context and circumstances of the publication, it cannot be ruled out that any objective and fair minded person would hold the view which is capable of a defamatory meaning against the plaintiff which is to cast imputations on the plaintiff's reputation. Why was there a necessity for the defendants to summarise DW1's statement and publish the first article in the front page story of *Utusan Malaysia* in the fashion as it has been published and then againt reproduce DW1's statement at p 10 which no doubt produces imputation on the plaintiff which is capable of conveying a defamatory meaning to the right thinking members of the society generally. Having caused damage to the plaintiff by publishing the first article on the front page of *Utusan Malaysia*, the defendants chose also to reproduce and publish the question and answer between DW4 and DW1 at p 10 of *Utusan Malaysia* which words were not true when it was not said by the plaintiff in his statement to BBC.

[70] On the factual matrix of the present case, this court finds that there is lack of 'responsible journalism' shown of any reasonable steps taken by DW3 to verify directly from the plaintiff or the least to distinguish the plaintiff's statement given to BBC by publishing the plaintiff's statement with DW1's statement in *Utusan Malaysia* in response to the question by DW4. Under the circumstances, it was not reasonable for the defendants to have taken a high risk to publish the articles as contained in the front page and at p 10 of *Utusan Malaysia* without verifying the truth. This court finds that the articles published by the defendants cannot be reconciled and is manifestly disproportionately unbalanced upon considering the plaintiff's statement to BBC where the readers and the public are only left to read and form their views in isolation on the articles published by the defendants on 17 January 2012 without the benefit of knowing or reading the plaintiff's actual statement given to BBC which rightfully calls for verification from the plaintiff before it was published. On the other hand, had the defendants also published or reproduced the plaintiff's statement to BBC together with the statement of DW1, perhaps, it could have provided a clearer and fairer version to the readers and the public that the plaintiff did not at any time form or express any opinion

or had intended or wished gay, lesbian, homosexual and transgender activities *(kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* is to be legalised but on the contrary the plaintiff had merely expressed his concern as to whether the laws relating to homosexuality should be reviewed in view of the harshness of the punishment imposed upon innocent people who were implicated.

[71] There is absolutely no evidence that DW3 had acted after a reasonable verification of the articles before it was published and it was published with total disregard to the truth. In fact, the question posed by DW4 to DW1 at the press conference which was called by DW1 in respect of an unrelated matter was itself not justified as the plaintiff did not dispute (*mempertikaikan*) the law on homosexuality but had merely advance his views for review and shown his concern on the harshness of the punishment imposed on innocent people. Therefore, the response from DW1 to the question posed by DW4 did not entirely reflect on the views as contained in the plaintiff's statement to BBC but it would appear to be based on an incorrect version and assumption. First, it gives an compression as if the plaintiff had disputed the laws on homosexuality which was not the case when one reads his statement in the BBC interview and secondly, there was no mention of the plaintiff having wished to legalise gay, lesbian, homosexual and transgender be it expressly or impliedly or had ever disputed the legality of the law on homosexuality. Accordingly, it was not a fair and a correct statement of fact to raise the issue of legalising the law on gay, lesbian, homosexual and transgender and that it would trigger volatility and fragmentation in society and chaos in the country *(boleh mencetuskan pergolakan dan perpecahan dalam masyarakat serta kekacauan dalam Negara)*. The balance of public benefit, public good or in public interest lay in its publicity rather than a hurried publication of the articles without ensuring that is published is accurate and fit for publication. In the present case, the defendants had published the articles without care and circumspection. The articles were published without any basis for the believe in its truth and without any reasonable grounds of such a believe and without the exercise of such means to verify its truth which ought to have been taken by a man of ordinary prudence under the circumstances. Consequently, the publication by the defendants of the article as contained at the front page of the *Utusan Malaysia* on 17 January 2012 and at p 10 is capable of being defamatory and in fact is defamatory of the plaintiff.

[72] Therefore, this court finds that the defamatory articles concerning the plaintiff did not commensurate with the plaintiff's statement to BBC and was in excess of the privilege which accords only a qualified privilege and not absolute. The defendants, therefore, cannot seek protection under the shield of privilege which is qualified. Accordingly, it is not reasonably appropriate and safe to have published anything whatsoever to the effect of 'dihalalkan'

(legalising) gay, lesbian, homosexual and transgender activities *(kalau kegiatan gay, lesbian, homoseksual dan transgender itu hendak dihalalkan di Malaysia)* as the articles published by the defendants are completely disproportionate and misleading and does not contain any truth in relation to plaintiff's statement to BBC which has been taken and published out of context for which the defendants must be prepared to accept the legal consequences for not practising 'responsible journalism' under the circumstances. In the cicumstances and based on the totality of the evidence, the defence of qualified privilege must also fail upon considering DW3's conduct during the meeting of the editors and sub-editors and his evidence in court, in the circumstances surrounding the publication which he had approved for publication with complete disregard to the truth and the reputation of an individual, in the present case, the plaintiff.

'Qualified privilege as a live issue only arises where a statement is defamatory and untrue and assuming the matter to be one of public interest but the test of *responsible journalism*, (*Bonnick v Morris* [2003] 1 AC 300). There is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify. 'No public interest is served by publishing or communicating misinformation'. But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.' (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at p 238).

[73] In the circumstances and based on the factual matrix of the present case, if the defence of 'reportage' is accepted as a recognised defence in all cases of defamation against the press, the media and/or its editors and publishers, all that was required of the media if it is motivated by malice, is to collect or obtain information from any individual and without verifying the truth of it just proceed to publish and then when it is sued, seek protection or shield itself by stating that it had merely quoted the statement made by others and had published or it is a mere repetition of what was said by others and published the same in the newspaper which would affect the reputation of an individual. This court is of the view that it cannot by any stretch of the imagination be right that the defendants be permitted to raise such a defence as a recognisable defence to reject a defamation claim against the editor, reporter or the publisher, in particular, upon considering the factual matrix of the present case and the nature of the subject matter. Furthermore, the defence of reportage has not been included as one of the statutory defences in the Defamation Act 1957 and it would open the floodgates if accepted as a recognisable defence and may result in or be seen to be free-for-all but for the restriction as provided under s 12 of the Defamation Act 1957 which on the factual matrix of the present case does not apply and is not available to the defendants.

[74] In summary, plaintiff has succeeded by producing sufficient evidence

before this court to draw an inference of express malice on which and on the factual matrix, it is reasonable to find malice against the defendants. Therefore, the defence of *fair comment* or *qualified privilege* cannot be sustained as:

(a) the circumstances on which the articles were published is questionable;

(b) there was no verification from the defendants before the articles were published and taking into consideration that DW1 was confronted *impromptu* and he himself did not verify the same as at the time he was an aggrieved person against PAS which was part of Pakatan Rakyat and headed by plaintiff;

(c) there were no good reason to accept the statement of DW1 without verification which does not commensurate and is not proportionate with the plaintiff's statement to BBC;

(d) there was lack of care and caution exercised by DW3 despite the concern and reservation of DW4 for the articles to be published and the open admission of DW3 that the plaintiff's statement to BBC did not state that the plaintiff had supported homosexual activities and that 'perkataan menghalalkan itu tidak ada' in the plaintiff's statement;

(e) the articles published by the defendants are a gross misstatement of facts and total disregard to the reputation of an individual, in this case, the plaintiff;

(f) the articles seem to have distorted the true facts as stated by the plaintiff in his statement to the BBC and has given a colour decidedly unfair to the plaintiff;

(g) the articles which were published without due care an attention to the plaintiff's statement to the BBC and without making attempt to verify before the publication was approved;

(h) the article had exceeded the boundry of fair comment, qualified privilege and reportage; and

(i) accordingly, the defendants were not justified in publishing the said imputations without verification.

[75] On the other hand, if the defendants take the position that the suits against them are politically motivated, then, the defendants should have, first, verified to ensure the truth of the articles. Secondly, if the defendants' complaint is that these suits are all politically motivated suits, then arguably, it will be a situation where the publication by the defendants is also motivated with malice as contended by the plaintiff and 'berunsur politik', being 'tit for tat'. Thirdly, if there are 'banyak saman yang kita anggap berunsur politik', as testified by DW4, surely it calls for more caution, extra care and responsibility to be exercised on the defendants' part in order to seek for verification as to the

truth of the statement made by a third party, in this case, DW1, before the defendants published the articles. Fourthly, if the defendants' position is that there is no basis for the suit or suits and it had been filed with bad faith against them for political reasons, then the defendants have the option under the Rules of Court 2012 to apply to strike out the suit for abuse of the process of the court. It is the considered view of this court that the complaint on the defendants' behalf of 'menghadapi banyak saman yang kita anggap berunsur politik' and therefore, impliedly, they do not have to seek verification as to the truth of the articles before publication is unreasonable and unacceptable. First, it is a case of irresponsible journalism where the articles were published with total disregard to an individual's reputation and secondly, a reasonable inference to be drawn from the complaint on the defendants' behalf is that, something is not right in Utusan Melayu (M) Bhd for 'banyak saman' against them and yet there is no evidence before this court that these 'banyak saman' against them allegedly for political reasons had been struck out by the courts for abuse of the process of the court.

[76] Accordingly and perhaps, there is a need to revamp or clean up the entire system of journalism and the practices carried out by the editorial board, in general and in particular, the defendants, in the selection of articles to be published to ensure that the articles selected and published are properly verified even if it were to delay the publication in the newspapers as reputation of an individual is far more important than the commercial interest even if the publication has the support of a political party or for the advantage of a political party. Accordingly, this course of action or precautionary steps if taken, perhaps, may eliminate the fear of the defendants having to face 'menghadapi banyak saman' or reduce the number of claims against the defendants if there are in fact 'banyak saman yang dianggap berunsur politik'.

PRESS-MEDIA

[77] Before concluding, this court should perhaps, add few words on the role of media with reference to an individual's reputation. In general, 'media' refers to various means of communications, like newspapers, magazines, television, radio that reaches or influences the people or society widely. The term 'media' is also used for the 'press' or newsreporting agencies. The expression 'press' concerns with the printing and/or publication or printed materials or matters. In other words, the 'press' refers to 'media' and no longer refers to the traditional print media alone. It now encompasses the electronic media, the internet. Breaking news is a new buzzword.

[78] As to the role of the 'press' or the 'media', it cannot be denied that it has been the focus of much critical attention over the recent years and has become such integral part of everyday life. Therefore, there is a real need to examine

closely the legal dimensions that govern the rights and responsibilities of the 'media' which had resulted in the increase on the number of defamation suits filed in court, in particular, against the publishers, and the newspapers. As the growth of the power of the press has increased around the region and the world as a whole as such, there is an urgent need to balance the citizens' right to privacy and individual's reputation and the right of the 'press' and other media's responsibility which includes 'trial by media'.

[79] In so far as to the object of the 'press', the purpose of the press is to advance the public interest by publishing facts, the truth and opinions without which any democratic country or any citizen or right-thinking citizen cannot make responsible judgments. (*Indian Express Newspapers (Bombay) (P) Ltd v UOI* 1995 SC 965).

In *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, Lord Salmon quoted with approval at p 1189, the comments of Lord Denning MR at p 1129:

> the public has a right to access to information which is of public concern and of which the public ought to know. The newspapers are the agents so to speak of the public to collect that information and to inform the public of it.

[80] In the present case, the plaintiff's defamation suit is against the editor and the publisher of a daily newspaper, the *Utusan Malaysia*. While the media is free to report news and publish matters of public interest against an individual, organisation or political party, it is important that the media do not also infringe or encroach into the judicial domain. In other words, the media is not permitted to publish any kind of report concerning a subjudice matter or to do a sting on some matter which is pending decision in any manner they please. The legal parameter within which a report of comment or an article on a subjudice matter is well defined and any report, comment or article in breach of the legal bounds would invite legal consequences compared to normal reporting, a sting reporting is an incalculably more risky and dangerous thing to do. A sting is generally based on deception and, therefore, it would attract the legal restrictions with far greater stringency and any infraction would invite severe punishment (*RK Anand v Registrar, Delhi High Court* (2009) 8 SCC 106 at p 197–98 para 291). The freedom of press does not mean that the press can pick and choose persons out of personal or political animosity or monetary inducements with the purpose of defaming an individual. In the present case, when the plaintiff had disputed and denied the articles published by the defendants through the legal notice dated 17 January 2012, the defendants should have published a clarification of the articles based on the plaintiff's statement to BBC if the publication of the articles was not actuated by malice as both parties ought to have the advantage of being heard by the public.

[81] In exercising its right to publish news which may appear to be of public interest, the defendants as the publisher shall maintain proper regard for democratic values, public order as every person has a right not only to safeguard dignity, honour and reputation but he must be protected from being exploited for political or commercial purposes. Commercial purpose in the sense of increasing the daily sales of the newspaper by giving or publishing sensational, misleading, provocative or offending title to the newsreport or articles or publish the untruth or publish articles without verifying the truth of it, especially, when it touches on the morals, integrity and reputation of an individual or corporation, in the present case, the plaintiff. The law of defamation is a recognition of the inherent right of every individual to the preservation of his honour and the esteem in which he is held in society. Every individual has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification. Reputation has an integral and important aspect of the dignity of an individual. Reputation has an important bearing on many decisions in a democratic society which are vital to its well being: whom to vote for, whom to work for, whom to employ, whom to do business with, whom to socialise with. However, 'a damaging libel may lower an individual's standing in the eyes of the public and even its own staffs; make people less ready or less willing to deal with it'. The right to preservation of ones reputation is acknowledged as right in rem, a right good against the whole world (*State of Bihar v Lai Krishna Advani* (2003) 8 SCC 361).

'The freedom of the journalist is an ordinary party of the freedom of the subject, and to whatever, lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. The responsibilities which attached to this power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.' (Lord Shaw in *Arnold v King Emperor,* LR(1913–14) 41; AIR 1914 PC 116).

In *Janab Sultan Salahuddin Owaisi v Syed Viqaruddin And Anor* (2005) Cri LJ 2726, PS Narayana J said:

> Publishers, editors, journalists and reporters forming part and parcel of freedom of speech and expression, which no doubt includes freedom of press as well, are entitled to ventilate the views only within the permissible limits, permissible by law and not beyond thereto. They are expected to be careful and cautious while proceeding with publication of the matter and they cannot claim any special privilege as far as the law relating to defamation is concerned. It may be part of their lawful duties, but at the same time they also owe a duty to be careful and diligent in verifying such statements with care and caution before publishing them. Negligent and reckless allegations constituting defamatory statements can never be protected under the guise of any of the exceptions.

[82] The publishers, editors, journalist and reporters who form part and parcel of freedom of speech and expression which no doubt includes freedom of press as well, are ordinarily entitled to ventilate the views only within the boundary or limits permissible by law and cannot proceed beyond thereto or free-for-all or to publish without being damned (*Janab Sultan Salahuddin Owaisi v Syed Vigaruddin* (2005) Cr LJ 2726). In other words, the right to freedom of expression is a qualified right, it is not absolute and is not free for all, and that the exercise of that right may no doubt be subject to such restrictions as provided by law and are necessary in a democratic society for the protection of the reputation, privacy or rights of others (*Warren v Random House Group Ltd* (2007) EWHC 2856 (QB). Accordingly, the law of defamation is the culmination of a conflict between society and the individual. The law of defamation seeks to attach a balance between two competing freedoms, the fundamental right to freedom of speech and expression enshrined under art 10 of the Federal Constitution and to safeguard the right of the individual to have his reputation intact (*Shobhana Bhartia v Nct of Delhi and Another, 144* (2007) Delhi Law Times 519 [Del HC]). The right to publish newsreport or article should not be construed as free-for-all as there is no absolute freedom without any restriction so that the press will not be misused to defame others. The restrictions is important to ensure that the press act professionally and be responsible and be sensitive towards an individual's reputation and not just act as a recording machine so that it will not be used as an instrument by some unscrupulous or by political or commercial people for their own hidden agenda or to defame an individual.

[83] Having considered all the circumstances of the case and carried out the necessary balance between the importance of the role of the media in the expression and communication of information and comment on matters of public concern and the protection given to the reputation of an individual, this court find that there must be some sense of 'responsible journalism'. Some have their own axes to grind, or are being paid for their stories or being used by certain organisation to publish and scandalise an individual. The media must act professionally and should not be allowed to be used as an instrument to publish lies or misleading articles. The press has to be on guard against being found liable for defamation. The standard of conduct required of the publication of the material must be applied in the practical manner having regard to the practical realities. The assessment of 'responsible journalism' does not mean the court must carry out a micro-manage the editorial practices of media organisation. While the journalist has a professional duty to seek out or gather information that is of public interest and to impart it to the public by publication, it should strike a balance and it must ensure that there is sense of 'responsible journalism' and that would include the editors, publishers and politicians. The role of media in collecting and disseminating information to the public should not give rise to a public interest which can be allowed to prevail over an individual's reputation which ought to be protected as the good

name of an individual, is a thing of value. However and in any event, that conferment on the media can exist only if 'it acts with due sense of responsibility'.

[84] The legitimate public interest for the media to publish even if the information was newsworthy may in some cases enter into conflict with other legitimate interests such as the protection accorded to an individual's reputation. The press cannot publish a defamatory lie about anyone. The press should not publish untrue statement of fact about anyone which tends to lower an individual in the mind of right-thinking people but favour the press (*Liberace v Daily Mirror Newspaper Ltd,* The Times June 17, 18, 1959). Every man whether he is in public life or not, is entitled not to have lies published of him and no one is entitled to make statement of fact about a person which are not true and which may or redound to his discredit or tends to lower him in the estimation of right thinking people. (*Silkin v Beaverbrook Newspapers* [1958] 2 All ER 516). Reputation is valued by individuals for it affects their self-esteem and their standing in the community. Reputation traduced by a libel 'the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights'.' (*Ratcliffe v Evans* [1892] 2 QB 524 at p 528). Therefore, the media or the defendants as in the present case, cannot use the press, the freedom of the press to impose unjust imputations against an individual's reputation. (*Astaire v Campling* [1966] 1 WLR 34).

[85] The press must exercise a balance reporting of news and must be prepared to publish the statement given by proponents and opponents and not just by the proponents as the press should take the position of practising professional and 'responsible journalism' and they should not have any personal interest as a professional body about the leaders of a political party whether the individual is in the ruling party or in the opposition so as to ensure there is transparency and balance reporting and equal opportunity is given to both parties. However, the main concern in some newspapers is the 'ownership' of the press which belongs to a particular political party. Consequently, the news reporter and journalist subordinated to editorial domination, an editor themselves are controlled by the policy of the proprietorate in power. However, the editors must works harder and be responsible to verify facts more carefully before granting approval for the publication of the news or articles provided by the reporters as the press must also be accountable to society for meeting the public need and for maintaining the rights of citizens and individuals and should not act in a 'casual, cavalier, slipshod or careless manner'.

'Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity' (*Blackstone* (1765) 4 Bl (151) at p 152).

[86] There are also occasions that in the discharge of their journalistic duties, some of the fair and accurate newsreport published in the newspaper happened to be objectional to some persons in public or of political positions and such people may react in anger and disappointment and file an action for defamation. On the other hand, the press or the media cannot under the guise of free expression and freedom of press proceed to publish defamatory matters and articles, issue after issue without any proper basis whatsoever. Holding a public position or being leader of a political party should not also be seen to be at the receiving end of attack 'day in and day out'. The press, especially the main stream media must ensure that the newsreport published is fair, transparent and has proper balance and basis for the news and it is published after verification if it is a matter which may attack a reputation of an individual so that the claim for defamation against the press or media can be eliminated or reduced. The cardinal principle that must be observed is that any incursion into press freedom that the law lays down should go no further than is necessary to hold the balance between the right to freedom of expression and the need to protect the reputation of the individual. It must not be excessive or disproportionate.

[87] In many countries, journalist and editors have established voluntary self regulatory bodies. Under this self regulatory bodies as in United Kingdom, known as the 'Press Complaint Commission' ('PCC') for individuals who believe that their reputation has been negatively affected as a result of the unprofessional reporting of the media will be able to lodge a complaint to the PCC who in turn would be able to suggest appropriate steps to be taken by the media in reference to the publication of an individual or person affected by the publication of the articles or the newsreport. The establishment of the PCC by the newspaper industry or the media as in United Kingdom in June 1991 could provide a process of conciliation, one, if there is an apology or correction or clarification, the defendants would behave reasonably as they would have accepted amendments for the misleading article. The stress of litigation and being in court for days or weeks may in some cases would at least significantly be reduced. This commission may also assist in the offer of amends procedure or give both parties, the media and the plaintiff a possible conciliation procedure and give an opportunity for both parties to achieve an economical and quick solution to the plaintiff's complaint. The standard of responsible journalism in some countries is made more specific by the code of practice which has been adopted by the newspapers and ratified by the Press Complaint Commission although it is not binding upon the courts, but it can provide valuable guidance.

Paul Dacre, Chairman of Editors' Code of Practice and Editor, the Daily Mail in his forward to the *Editors' Code Book* has, inter alia, said:

> The media's challenge is on two fronts:

First, to combat those who threaten the vitally important role the media plays in a healthy democracy and, with it, the public's right to know. Second, we must ensure that our own defences are sound, that the press's house is in order and that, in judging the competing freedoms of the right to know and the right to privacy, we have the balance right.

The roles of the Editors' Code of Practice Committee, which sets out the rules for achieving that balance, and the Press Complaints

Commission — which ensures the rules are observed and that there are adequate remedies for breaches —are key to this.

As Code Committee Chairman, as a former Commissioner on the PCC and, of course, as an editor, I know how difficult it is to achieve that balance. We in the media all walk that tightrope every day. Sometimes we get it wrong - and here in *The Editors' Codebook* are cases that will make all good editors and journalists wince. They remind us that there is never room for complacency. We must learn by our mistakes. Where there are legitimate public concerns, we must respond to them. Indeed, getting that balance right is a constant theme that runs through the Codebook and demonstrates how we have listened to and responded to criticism.

As I have stressed, this Codebook shows that there is no cause for complacency on the part of the newspapers but, equally, it has important lessons for our detractors. First, it shows that we are in the business of learning — why else would a constantly revised Codebook exist? Second, it demonstrates that the self-regulatory system is *genuinely* responsive to public concerns. And third, I hope it kills the myth that the balance that we attempt to strike is a shabby compromise between individual rights and a self-serving media waving the flag of press freedom.

Indeed, the words press *freedom* appear nowhere in the Editors' Code of Practice. What is mentioned is *freedom of expression* and *the public's right to know*, neither of which is the exclusive preserve of the press. Certainly, the balance between that public right to know, on the one hand, and the rights of the individual on the other, lead to genuine tensions, but they are inherent in any truly free system.

A democracy as a whole, not just the media, has to get the balance right. Go too far in either direction and it is members of the public - collectively or singly - who suffer. And constantly at risk is the Open Society itself.

[88] Therefore, upon considering the chronology and the factual matrix of the present case, this court is satisfied that first, the two articles when considering its natural and ordinary meaning would in the right thinking members of society generally lower the reputation of the plaintiff. In other words, the right thinking members of the society would understand the article in a defamatory sense and is capable of defamatory imputation and is defamatory of the plaintiff (*Sim v Stretch* [1936] 2 All ER 1237). In the circumstances, and on the evidence before this court and on the authorities this court is satisfied, the plaintiff has established the claim on liability as pleaded against the defendants. As for the defences, the defendants have failed to establish all the statutory defences, namely, justification, fair comment and

qualified privilege including the defence of reportage as pleaded and is not available on the factual matrix of the present case and for the reasons as stated above. The plaintiff is manifestly entitled to succeed in his claim against the defendants.

[89] A word of caution is necessary that while reported cases may play vital part in the understanding of the law of defamation, but the cases are only of assistance, if they have laid down or expounded some legal principles as the legal principles apply only to the particular set of facts of the case. The function of the court is never to decide whether any particular set of words or articles are or not defamatory. What the court decides is whether in the particular circumstances in which the articles are alleged to have been published they bear in law the defamatory meaning. As to whether the articles published were actuated with malice depends, in the circumstances of this case, at the time of the publication and this court has arrived at its conclusion that the publication was actuated with malice. In any event, this court had gone through all the decided cases on the law of defamation both locally and from foreign jurisdiction and find it is unnecessary to deal with it separately but for the principles of law which this court had drawn from the cases.

As early as in 1714, the Court of Queen's Bench in *Harrison v Thornborough* (1714) 10 Mod Rep 196 said at p 197:

> Precedents in actions for words are not of equal authority as in other actions, because normal loquendi is the rule for the interpretation of words, and this rule is different in one age from what it is another. The words which a hundred years ago did not import slanderous sense now may; and so vice versa.

[90] The plaintiff's anxiety in filing this action was presumably to vindicate his reputation, and in this matter, he has succeeded as by a successful action the unjustified injury to a reputation is vindicated. However, his purpose would have been substantially served if only the defendants had retracted the insinuation or imputation published against the plaintiff as contained in the articles which this court has found to be defamatory of the plaintiff or clarified the same with a correction, or amends upon receiving the legal notice dated 17 January 2012 from the plaintiff's previous solicitors or at least with an expression of regret but nothing was done by the defendants.

[91] As for the issues to be tried, the decision of this court is as follows:

Issue No 1 –	Affirmative
Issue No 2 –	Affirmative
Issue No 3 –	Negative
Issue No 4 –	Negative
Issue No 5 –	Negative

Issue No 6 –	Negative
Issue No 7 –	To be assessed

[92] In accordance with the rules of reasons and justice, the plaintiff's claim against the defendants on liability is allowed with costs. As both parties had during case management agreed that this court is to decide first, the issue of liability and if liability is found against the defendants, the court would then proceed to assess the damages. The plaintiff's claim on liability is allowed. Prayers No 1–3 is ordered to be assessed by this court. Prayer No 4 is subject to prayers No 1–3. There is no order for prayer No 5. Costs of this action is fixed at RM45,000 to be paid by the defendants to the plaintiff. The assessment of damages is fixed for case management on 15 February 2013 before this court.

Plaintiff's claim allowed with costs.

Reported by Kartini Dalina Md Daud